TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 274.

ELIZABETH ABRAHAM, LEHMAN ABRAHAM, MARKS ABRAHAM, ET AL., APPELLANTS,

vs.

FREDERICK E. ORDWAY, MARY ELIZABETH ORDWAY, AND ELLEN PRESTON, DEVISEES OF HARRIET ORDWAY, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 21, 1891.

(14,815.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 22, 1894.

1 Filed Jan. 18, 1890. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia, the Third Day of August, 1889.

ELIZABETH ABRAHAM, LEHMAN ABRAHAM, Marks Abraham, Jacob Abraham, Isaac Abraham, Samuel Abraham, Levi Abraham, Complainants,
vs.
HARRIET ORDWAY, HOWARD N. NORRIS, JAMES L. Norris, Albert H. Norris, Emma Hume, Wife of Frank Hume, Anna V. Tilden, Wife of Charles B. Tilden, Defendants.

Equity No. 11944, Docket 29.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainants respectfully set forth:

1. That the complainant, Elizabeth Abraham, is a resident of the District of Columbia. The complainant, Lehman Abraham, is a resident of Los Angeles, in the State of California; the complainant, Jacob Abraham, is a resident of Toronto, Canada; the complainants, Marks Abraham and Isaac Abraham, are residents of Boston, Mass; the complainant, Samuel Abraham, is a resident of Montreal,
2 Canada; the complainant, Levi Abraham, is a resident of New York city, in the State of New York. The complainants are the children and only heirs-at-law of Esther Rebecca Abraham, deceased, and bring this suit in their own right.

2. That all the defendants are residents of the District of Columbia. The defendant, Harriet Ordway, is sued in her own right; the defendants, Howard M. Morris, James L. Norris, Albert H. Norris, Emma Hume, and Anna V. Tilden, are sued as the children and only heirs-at-law of John E. Norris, late of the city of Washington, District of Columbia, trustee, deceased.

3. That on and prior to the 22d day of May, 1869, complainant, Elizabeth Abraham, was the wife of Bernard Burnstine, of the city of Washington, District of Columbia, and on said 22d day of May, 1869, said Bernard Burnstine executed and delivered to one Levi Abraham, trustee, and father of complainants, and now deceased, a certain instrument of writing, by the terms and effect of which said Bernard Burnstine conveyed to said Abraham, trustee, a certain lot, piece or parcel of land, lying, situate, and being in the District of Columbia, and known and described as the east twenty-five feet front on Massachusetts avenue, by depth thereof of lot numbered nine (9), in square numbered four hundred and fifty-two (452), in said city in trust, for the sole use and benefit of complainant, Elizabeth Abraham, and with power to said Elizabeth to sell, devise, or dispose of the same in the same manner as if she were a *feme sole*, as will more fully and at large appear by reference to said deed, recorded in Liber

D, No. 8, folio 370, *et seq.*, one of the land records of the District of Columbia, which is prayed to be read and taken as a part hereof.

4. That on or about the 10th day of May, 1870, the complainant, Elizabeth Abraham, was divorced from the bond of matrimony with said Bernard Burnstine.

3 5. That subsequently, to wit, on or about the 24th day of June, 1870, said Elizabeth was married to one Solomon Caro.

6. That on or about the 24th day of September, 1870, said Solomon Caro, then husband of the said Elizabeth, borrowed of the defendant, Harriet Ordway, the sum of $3,000, for which said Elizabeth executed what perported to be a promissory note, bearing date the 24th day of September, 1870, and made payable to said defendant Ordway, for $3,000, in two years from date, with interest at 10 per cent., and as security for said note said Abraham, trustee, and said Elizabeth, made, executed, and delivered to John E. Norris, trustee, a certain deed, bearing date the 24th day of September, 1870, convering the hereinbefore-mentioned property to said Norris, in trust, as will more fully and at large appear by reference to said deed of trust, recorded on the 26th day of September, 1870, in Liber, 626, folio 43, one of the land records of the District of Columbia, which is prayed to be read and taken as part of this bill of complaint.

7. That subsequently said Solomon Caro abandoned said Elizabeth, and she on the 20th day of October, 1876, obtained from this honorable court a decree divorcing her from the bond of matrimony with said Cairo, and restoring to her her maiden name of Elizabeth Abraham, as will more fully appear by reference to the said decree and the proceedings in equity cause No. 5023, in said court, which decree and proceedings are prayed to be read herewith and taken as a part hereof.

8. That said Elizabeth continued to pay interest to said defendant Ordway on said note for about eight years, but eventually ceasing so to do, an alleged sale was made of said property on the 6th day of January, 1879, under said deed of trust, and thereafter, and in pursuance of said sale the said trustee, John E. Norris, executed to the defendant, Harriet Ordway, the then holder of said note, a deed

4 purporting to convey to her the said property in fee, as will more fully and at large appear by reference to said deed, dated January 6th, 1879, and recorded in Liber 903, folio 344, one of the land records of the District of Columbia, which is prayed to be read and taken as a part hereof.

9. That on or about the 21st day of December, 1874, the complainant, Elizabeth, joining in a deed with said Levi Abraham, trustee, conveyed the hereinbefore-described land and premises to said Esther Rebecca Abraham in fee, as will more fully and at large appear by reference to said deed recorded in Liber 733, folio 437, one of the land records of the District of Columbia, which is prayed to be read and taken as a part hereof.

10. That on or about the 10th day of August, 1886, the said Elizabeth Rebecca Abraham departed this life, intestate, leaving as her

children and only heirs-at-law the complainants in this bill of complaint.

11. That said Esther Rebecca Abraham, having died intestate as aforesaid, the title to the said land and premises is vested in the complainants as heirs-at-laws of said Esther.

12. That said Harriet Ordway is now, as complainants are informed and believe, and therefore aver, in possession by her tenants of said land, by virtue of said conveyance from said Norris, trustee, and that since said sale and conveyance the said Ordway has received the rents and profits thereof.

13. That said Abraham, trustee, departed this life on the 28th day of April, 1876; that said Norris, trustee, also departed this life on the 4th day of February, 1887, leaving as his sole heirs-at-law the defendants, Howard M. Norris, James L. Norris, Albert H. Norris, Emma Hume and Anna V. Tilden.

14. Complainants are advised that the said promissory note having been executed by Elizabeth Abraham while she was a married woman, is void, and of no legal force and effect, and that said deed of trust by said Abraham and herself to Norris is consequently of no effect as a security for said note, and that the conveyance by said Norris to said Ordway has created a resulting trust for the benefit of these complainants.

Complainants therefore pray—

Prayers.

1. That the defendants may be required to appear and answer the exigency of the bill.

2. That the court will declare the said deed of conveyance from said Norris, trustee, to said defendant Ordway to have created a resulting trust for the benefit of complainants.

3. That said defendant Ordway be decreed to convey all her right, title and interest in the hereinbefore-mentioned land to these complainants, and upon her failing so to do, that a trustee be appointed by the court to make said conveyance.

4. That said defendant, Harriet Ordway, be required to account to complainants for the rents and profits of said lot or parcel of land, and that the cause be referred to the auditor of the court to state an account, and to report the amount of said rents and profits.

5. That for the purposes aforesaid all necessary accounts may be taken, directions had, and orders given.

6. For such other and further relief as the nature of the case may require.

The defendants to this bill of complaint are—

Harriet Ordway, Howard M. Norris, James L. Norris, Albert H. Norris, Emma Hume, Anna V. Tilden.

ELIZABETH ABRAHAM.

FRANKLIN H. MACKEY,
Solicitor for Complainants.

6 I, Elizabeth Abraham, one of the complainants herein, do solemnly swear that I have heard read the bill by me above subscribed, and know the contents thereof, and that the facts therein stated on information and belief I believe to be true, and the facts therein stated of my own knowledge I know to be true.

ELIZABETH ABRAHAM.

Sworn to and subscribed before me this third day of August, 1889.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

7 *Demurrer.*

Filed Sep. 2, 1889.

In the Supreme Court of the District of Columbia.

ELIZABETH ABRAHAM *et al.*
vs.
HARRIET ORDWAY *et al.* } In Equity. No. 11941.

The demurrer of the defendant Harriet Ordway to the bill of complaint of the above-named plaintiffs.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiffs' bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that the plaintiffs have not in and by their said bill made or stated such a case as entitles them or any of them in a court of equity to any relief against her as to the matters contained in said bill or any of such matters.

J. J. DARLINGTON,
Solicitor for Def't Harriet Ordway.

The original demurrer having been lost or mislaid, it is stipulated that the foregoing copy, omitting the certificate of counsel and affidavit of demurrant, required by the rules of the supreme court of the District of Columbia and which appeared in the original, may be substituted in the record as for the original.

FRANKLIN H. MACKEY,
Sol. for Pl'tfs.
J. J. DARLINGTON,
Sol. for Def't Ordway.

8 *Decree Dismissing Bill.*

Filed Oct. 10, 1889.

ELIZABETH ABRAHAM *et al.*
vs.
HARRIET ORDWAY *et al.* } 11944. Equity.

This cause coming on to be heard upon the demurrer of the defendant Harriet Ordway to the bill of complaint and having been argued by counsel and duly considered, it is by the court, this 10th day of October, A. D. 1889, ordered, adjudged, and decreed that the said demurrer be, and the same hereby is, sustained, and that the said bill be, and the same hereby is, dismissed with costs.

W. S. COX, *Justice.*

ABRAHAM *et al.*
vs.
ORDWAY *et al.* } 11944. Equity.

The clerk will enter an appeal from the decree dismissing the bill in this cause.

Oct. 16, 1889.

(Signed) FRANKLIN H. MACKEY.

Appeal as ordered entered.
'89, 10, 16.

BY THE CLERK.

9 *Copy of the Deeds Referred to in the Bill.*

Bernard Burnstine & Wife
to
Levi Abraham. } Deed. Recorded May 22, 1869.

This indenture, made this 22 day of May in the year eighteen hundred and sixty-nine between Bernard Burnstine and Elizabeth Burnstine, his wife, of the one part, and Levi Abraham of the other part, all of the District of Columbia.

Whereas the said Burnstine, and the said Elizabeth his wife in consequence of various unhappy differences which have *a* for a long time past and of late occurred between them; have mutually agreed to live separately and apart from each other during the remainder of their lives; and whereas the said Bernard Burnstine hath in view of the aforesaid fact, and of the zeal and diligence with which the said Elizabeth hath aided him in the prosecution of his affairs and the acquisition of his property, agreed to enter into
10 these presents.

Now this indenture witnesseth, that in pursuance of such agreement by and between the said Bernard, and said Elizabeth his wife, he the said Bernard Burnstine for himself, his heirs, executors

and administrators doth hereby covenant, promise and agree with and to the said party of the other part his executor and administrators in manner following; that is to say: that it shall be lawful for the said Elizabeth, and that the said Bernard shall and will from henceforth permit and suffer her, the said Elizabeth at all times hereafter during the joint lives of them the said Bernard Burnstine and the said Elizabeth to live separately and apart from him the said Bernard, and to go, reside and be at such place or places and with such family or families, relations, friends and others, as the said Elizabeth, notwithstanding her coverture shall from time to time think fit, wholly freed and discharged from all power, authority, government and restraint of
11 him the said Bernard in like manner, and in all respects as a *feme sole;* and that he the said Bernard Burnstine shall not, nor will he at any time or times hereafter, sue molest or disturb, or caused to be sued, molested or disturbed either by threats or otherwise however, either by ecclesiastical process, threats thereof, or in any other way. The said Elizabeth for so living apart from him as aforesaid or any other person or persons whomsoever for receiving, harboring or entertaining her during such separation, provided always, he the said Bernard is not to be liable for any debts hereafter contracted by his said wife, and if sued therefor is indemnified and saved harmless therefrom by the said party of the other part, who in testimony of accepting this trust and said responsibility hath attached his hand and seal to this deed at the time of the execution thereof, and provided further that nothing in this instrument of writing shall be taken to be as qualifying or defining
12 either the said Bernard or the said Elizabeth of his or her legal rights under any present or future law, to a divorce from the bond of matrimony for causes hereafter arising and legal grounds therefor, nor from the protection and provisions of any present or future law enacted to affect the rights of husband and wife respectively over their own persons or property, or the disabilities now and heretofore existing by reason of coverture.

And in consideration of the premises and in pursuance of the agreement aforesaid, the said Bernard Burnstine doth hereby bargain sell and deliver to the said party of the second part, his executors, administrators and assigns the following articles now in his possession: One carriage, one sleigh, one horse, one set of harness, two buffalo robes, and the wardrobe of the said Elizabeth, and the following list of family and household and kitchen furniture, namely, diamond rings, one of which is now worn by said Bernard, one dia-
13 mond breastpin and earrings to match, one silver ladle, one silver card case, one brussel carpet, the set of parlor furniture, one cottage set, two down (?) feather beds, four pillows, and all the kitchen implements and knapkins, one-half of the blankets; all of which said household and kitchen furniture are now in house numbered 475 on 13th street west in the city of Washington, and two thousand dollars ($2,000) in cash upon the trusts following, that is to say: to deliver the aforesaid chattels to the said Elizabeth upon

her request in writing to be by her received, held and appropriated as her own separate property.

And the said Bernard Burnstine doth further in pursuance of said agreement, and in consideration of the premises hath granted, bargained and sold, assigned, transferred and set over, released, conveyed and confirmed and by these presents doth grant, bargain and sell, assign, transfer, set over, release, convey and con-
14 firm to the said party of the second part his heirs and assigns, all that piece or parcel of land lying, situate and being in the city of Washington and District of Columbia, being a part of lot numbered nine (9) in square numbered four hundred and fifty-two (452), as the said lot and square are laid down and described on the plat of said city, being all that eastern portion of said lot fronting twenty-five (25) feet on Massachusetts avenue and running back with that width the full depth of said lot. Being the same property conveyed by Seth Hillman and wife to said Bernard on the 26th day of March, A. D. 1868, together with the hereditaments, easements and appurtenances thereunto belonging or appertaining.

To have and to hold the said land and premises and with all and singular the appurtenances thereunto belonging or in anywise appertaining to and unto the said party of the second part his heirs and assigns, upon the trusts following, and for no other use or
15 purpose whatever, that is to say: Upon trust for the sole and separate use of the said Elizabeth with power to her at any time to dispose of said property in whole or in part or to encumber the same either by deed or will or other instrument in the nature of a last will and testament. And further the said trustee shall suffer and permit the said Elizabeth, her executors, administrators and assigns to have, hold, use, possess, enjoy the said trust property, and to receive the rents, issues and profits thereof as if she was a *feme sole*, and if she shall dispose of the said property by sale or otherwise the said trustee shall not be responsible for such sale or disposition, nor for the application for the proceeds of property.

And the said Bernard Burnstine for himself and his heirs, executors and administrators by these presents covenants promises and agrees to and with the said Levi Abraham, his heirs and assigns in manner following, to wit: That he, the said Bernard Burn-
16 stine is seized in fee and has a good right to convey in fee-simple the aforesaid land, and that he and his heirs shall and will warrant and forever defend the said land and premises with the appurtenances hereby bargained and sold unto him the said Isaac Abraham his heirs and assigns from and against him the said Bernard Burnstine his heirs and assigns and all persons whomsoever.

And further that he the said Bernard Burnstine and his heirs shall and will at any and all times hereafter at the request and cost of the said Levi Abraham his heirs and assigns make and execute any and every other deed of assurance in law for the more sure and effectual conveyance of the said land and premises with the appurtenances to the said Levi Abraham his heirs and assigns, that the said Levi Abraham his heirs or assigns or his or their counsel learned in the law shall or may desire, advise or require.

In testimony whereof, the said parties of the first and sec-
17 ond parts have hereunto set their respective hands and seals the day and year first above written with release of dower by said Elizabeth.

B. BURNSTINE. [SEAL.]
ELIZABETH BURNSTINE. [SEAL.]
L. ABRAHAM. [SEAL.]

Signed, sealed, and delivered in the presence of—
CHARLES WALTER.

18 *Copy of the Deeds Referred to in the Bill.*

Levi Abraham *et al.* to John E. Norris. } Recorded September 26, 1870. Trust. Liber 626, fol. 43.

This indenture, made on the 24th day of September in the year one thousand eight hundred and seventy, between Levi Abraham, trustee of Elizabeth Burnstine (now Caro), of the city of Washington in the District of Columbia, of the first part, and Elizabeth Caro, formerly Burnstine, of the same place of the second part, and John E. Norris of the same place of the third part.

Witnesseth: Whereas Bernard Burnstine by deed bearing date on the 22nd day of May A. D. 1869, and recorded in Liber D. 8, folio 370, one of the land records of the county of Washington D. C., did convey to the said party of the first part that piece or parcel of land hereinafter named and described, in trust for the sole and separate use of the said party of the second part, with
19 power to sell or otherwise dispose of the same as the said party of the second part might direct; and whereas the said party of the second part hath directed the said party of the first part to convey the said land and premises to the said party of the third part in trust to secure a certain debt to Harriet Ordway hereinafter mentioned, and has joined in this conveyance by signing, sealing and acknowledging this deed,

Now therefore this indenture witnesseth: Whereas the said Elizabeth Caro is justly indebted unto Harriet Ordway in the sum of three thousand dollars ($3,000), for which amount she hath the promissory note of the said Elizabeth Caro bearing even date with this indenture, and payable at two years after date with interest at the rate of ten per cent. per annum, said interest to be paid semi-annually in equal installments as the same shall fall due.

And whereas, the said parties of the first and second part-,
20 are desirous to secure the full and punctual payment of the said note, and all interest, costs, and expenses that may accrue thereon, according to the true intent and meaning of the same.

Now therefore the indenture witnesseth: That the said party of

the first part for and in consideration of the premises, and of the sum of one dollar to him in hand paid by the said party of the third part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, aliened, enfeoffed, conveyed and confirmed, and by these presents doth grant, bargain and sell, alien, enfeoff and confirm unto the said party of the third part, his heirs and assigns, all that piece or parcel of ground lying and situate in the said city of Washington and being the east twenty-five feet (25) front on Massachusetts avenue by the depth thereof of lot numbered nine (9) in square numbered four hundred and fifty-two (452), together with
21 the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and the remainders, reversions, rent, issues and profits thereof, and all the estate, right, title and interest and claim either at law or in equity of the said party of the first part in and to the same. In trust nevertheless for the use and purposes following and none other, that is to say, to suffer and permit the said party of the second part, her heirs and assigns to have, hold, use, occupy, possess and enjoy the said premises with the appurtenances as aforedescribed, and the rents, issues and profits of the same, to take, receive and apply to her own use, until some default or failure shall have been made in the payment of the said debt due as aforesaid to the said Harriet Ordway, or any part thereof, or of any proper interest, cost and charges thereon, or which may accrue thereon, and upon any and every such default or failure being made in the payment as aforesaid. The said party of the
22 third part shall at the request in writing of the said Harriet Ordway as the legal holder of said note, proceed to sell and dispose of the said premises as aforedescribed, or so much thereof as he may deem necessary at public sale to the highest bidder, upon such terms and conditions as he, the said party of the third part may deem most for the interest of all parties concerned in said sale, first giving at least fifteen days' notice of the time place and terms of sale by advertisement in some newspaper, printed and published in the said city of Washington, and such sale to repeat as postponed from time to time as the said party of the third part may deem expedient, and out of the proceeds arising from such sale or sales (after paying the proper expenses thereof, and other expenses of this trust, including five per centum on the gross amount of said sale or sales as compensation to said trustee for his
23 trouble and diligence in executing this trust), to pay in the first place whatever of said debt, interest, cost and expenses may be due and unpaid at the time of such sale or sales, secondly, to pay whatever of said debt, interest, cost and expenses may then remain unpaid, although the same may not then have become due and payable, and lastly the surplus, if any, to pay over to the said party of the second part, her executors, administrators or assigns.

In testimony whereof, the said party of the first part hath here-

unto set his hand and affixed his seal the day and year first hereinbefore written.

his
L. x ABRAHAM. [SEAL.]
mark.
ELIZABETH CARO. [SEAL.]

Signed, sealed, and delivered and duly stamped in presence of—
CHARLES WALTER.

24 DISTRICT OF COLUMBIA, } *To wit:*
Washington County, }

I, Charles Walter, a justice of the peace in and for the District and county aforesaid, do hereby certify that Levi Abraham and Elizabeth Caro, parties to a certain deed bearing date on the 24th day of September, A. D. 1870, and hereto annexed, personally appeared before me in the said county aforesaid, the said Levi Abraham and Elizabeth Caro being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and seal on this 24th day of September, 1870.

CHARLES WALTER, *J. P.* [SEAL.]

25 *Copy of Decree Referred to in Paragraph Seven, Original Bill.*

Final decree.

Granted Oct. 20, 1876.

ELIZABETH CARO }
vs. } In Equity. No. 5023.
SOLOMON CARO. }

This cause came on to be heard on the motion of the plaintiff, by her solicitor of record, upon the bill and evidence taken in the cause, and, the same being fully considered by the court, it is adjudged, ordered, and decreed on this 20th day of October, A. D. 1876, that the bond of matrimony subsisting between the plaintiff and the defendant be, and the same is hereby, annulled and dissolved, and that the maiden name of Elizabeth Abraham be, and the same is hereby, restored to her, as prayed in her bill of complaint.

A. B. OLIN, *Justice.*

26 John E. Norris, trustee, } Recorded January 21, 1879, 9.20
to } a. m. Trustee's deed.
Harriet Ordway. }

This indenture made this sixth day of January A. D. one thousand eight hundred and seventy-nine by and between John E. Norris trustee, and Harriet Ordway, both of the city of Washington in the District of Columbia,

Witnesseth: Whereas that heretofore Levi A. Abraham, trustee of Elizabeth Burnstine (now Caro) of the said city of Washington in the District of Columbia, and Elizabeth Caro (formerly Burnstine) of the same place of the second part and John E. Norris of the third part, that the said Levi Abraham, and Elizabeth Caro by their deed bearing date on the 24th day of September A. D. 1870, which is recorded in Liber No. 626 folio 43 one of the land records of Washington county in the District of Columbia did convey to the said John E. Norris his heirs and assigns, all that piece or parcel of ground lying and situate in the city of Washington aforesaid
27 and being the east twenty-five (25) feet front on Massachusetts avenue by the depth thereof of lot numbered nine (9) in square four hundred and fifty-two (452) together with the easements rights and privileges and improvements to the same belonging and in anywise appertaining and all the remainders, rents, issues and profits thereof, and all the estate, right, title, interest and claim either at law or equity of the said party of the first part in or to the same, in trust to suffer and permit the said Elizabeth Caro her heirs and assigns to have, hold, use occupy and enjoy the said premises with the appurtenances as aforedescribed, and the rents, issues and profits of the same to take receive and apply to her own use until some default shall have been made in the payment of the sum of three thousand dollars secured in the said deed of trust to the said Harriet Ordway or any part thereof or of any proper interest cost and charges thereon, or which might accrue thereon: and whereas, it was further provided that upon any
28 and every such failure or default the said John E. Norris, trustee as aforesaid, at the request of the said Harriet Ordway or the legal holder of the said note for $3,000.00 as mentioned in the said deed of trust to which reference is here made should proceed to sell and dispose of the said premises as aforedescribed, or so much thereof as he might deem necessary, at public sale to the highest bidder, upon such terms and conditions as he the said John E. Norris, trustee, might deem most for the interest of all parties concerned, he the said John E. Norris, trustee, first giving at least fifteen days' notice of the time, place and terms of said sale by advertisement in some newspaper printed and published in the said city of Washington and out of the proceeds of such sale after paying the proper expenses thereof, and other expenses of this trust, including five per centum on the gross amount of said sale to the said trustee for his trouble and diligence in executing the said trust: and whereas, the said Elizabeth Caro made default in
29 the payment of the said sum of three thousand dollars to the said Harriet Ordway who was the legal holder of said note and she the said Harriet Ordway did request the said John E. Norris, trustee as aforesaid, to make sale of the said real estate and he the said John E. Norris, trustee as aforesaid, in pursuance of said request which was in writing, did advertise the said property for public sale on the 21st day of December, 1878, to take place on the 6th day of January, 1879, at the premises, at 4 o'clock p. m. which time was more than fifteen days: said advertisement was

made in "The Post," a newspaper printed and published in the said city of Washington D. C. a copy of which is annexed hereto as part of this deed: and whereas, said sale was duly made in pursuance of said advertisement, and amongst the bidders at said sale the said Harriet Ordway party of the second part hereto, being the last and highest bidder, she having bid the sum of twenty-seven hundred and fifty dollars, the said property was knocked off
30 to her the said party of the second part at that price subject to all taxes and assessments due thereon:

Now therefore this indenture witnesseth that the said John E. Norris, trustee as aforesaid, for and in consideration of the premises and of the sum of one dollar to him in hand paid, at and before the ensealing and delivery of these presents by the said Harriet Ordway, hath granted bargained and sold aliened, enfeoffed conveyed and confirmed, and by these presents, doth grant, bargain, and sell, alien, enfeoff, convey and confirm unto the said Harriet Ordway her heirs and assigns the hereinbefore mentioned and described part of lot nine (9) in said square numbered four hundred and fifty-two (452), together with the improvements, ways, easements, rights, privileges, and appurtenances, and all the remainders, reversions, rents, issues and profits thereof as amply, completely and fully as he the said John E. Norris, trustee as aforesaid hath power
31 or authority, by virtue of the said deed of trust to convey the same.

In testimony whereof the said John E. Norris trustee hath hereunto set his hand and seal the day and year first hereinbefore written.

JOHN E. NORRIS, *Trustee.* [SEAL.]

32 *Decree of General Term Affirming Decree Below.*

Filed Jul- 6, 1891. R. J. Meigs, clerk.

In the Supreme Court of the District of Colu[illegible].

ELIZABETH ABRAHAM *et al.*
vs.
HARRIET ORDWAY *et al.*
} No. 11944, Eq. Doc.

Decree of the general term.

This cause coming on to be heard upon the appeal of the complainants from the decree of special term dismissing their bill, and having been argued by the counsel for the parties respectively and duly considered, it is thereupon, by the court in general term, this sixth day of July, A. D. 1891, ordered, adjudged, and decreed that the said decree of the court in special term be, and the same hereby is, affirmed.

E. F. BINGHAM, *C. J.*

33 *Appeal Allowed.*

Filed Aug. 3, 1891. R. J. Meigs, clerk.

In the Supreme Court of the United States, in General Term, the 3rd Day of August, A. D. 1891.

ELIZABETH ABRAHAM *et al.*
vs.
HARRIET ORDWAY *et al.* } Law.

The plaintiffs having prayed an appeal to the Supreme Court of the United States from the decree entered herein on the 6th day of July, A. D. 1891, the same is, this 3rd day of August, A. D. 1891, allowed.

By the court:

A. B. HAGNER.

Order Fixing Penalty of Bond.

Filed Aug. 11, 1891.

ELIZABETH ABRAHAM *et al.*
vs.
HARRIET ORDWAY *et al.* } 11944. Equity.

The plaintiffs' appeal to the Supreme Court of the United States having been heretofore allowed, it is now, this 11th day of August, A. D. 1891, ordered that said appellants give bond in the penalty of one hundred dollars, conditioned to prosecute his said appeal with effect.

E. F. BINGHAM, *C. J.*

34 *Assignment of Errors.*

Filed Aug. 11, 1891. R. J. Meigs, clerk.

In the Supreme Court of the United States.

ELIZABETH ABRAHAM *et al.*, Plaintiffs in Error,
vs.
HARRIET ORDWAY *et al.*, Defendants in Error. } 11944. Equity.

And now come the appellants in the appeal taken herein and pray that the decree of the supreme court of the District of Columbia against them and in favor of the defendants in error may be reversed because of the following error committed by the special term:

1st. In holding that the deed of trust executed by Levi Abraham to John E. Norris, dated the 24th day of September, 1870, and re-

ferred to in the 6th paragraph of the bill of complaint, was binding upon the complainants or created a charge upon the property mentioned therein.

2nd. In holding that the sale made of said property on the 6th of January, 1879, under said deed of trust and the conveyance made in pursuance thereof to the defendant Harriet Ordway was a valid sale and conveyance.

3. In sustaining the demurrer to the bill of complaint.

4. In dismissing the bill of complaint.

FRANKLIN H. MACKEY,
Solicitor for Complainants.

[Endorsed:] 11944. Eq. Abraham *v.* Ordway. Filed Aug. 11, 1891. R. J. Meigs, clerk.

35 Filed Aug. 11, 1891. R. J. Meigs, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Harriet Ordway, Howard N. Norris, James L. Norris, Albert H. Norris, Emma Hume, and Anna V. Tilden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days of the date hereof, pursuant to an appeal filed in the clerk's office of the Supreme Court of the District of Columbia, wherein Elizabeth Abraham, Lehman Abraham, Marks Abraham, Jacob Abraham, Isaac Abraham, Samuel Abraham, and Levi Abraham are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. F. Bingham, chief justice of the Supreme Court of the District of Columbia, this 11th day of August, in the year of our Lord one thousand eight hundred and ninety-one.

E. F. BINGHAM,
Chief Justice Supreme Court, D. C.

Service of copy admitted Aug. 14th, 1891.

J. J. DARLINGTON,
Sol. for Harriet Ordway.

36 In the Supreme Court of the District of Columbia, the 12th Day of August, 1891.

ELIZABETH ABRAHAM *et al.*
vs.
HARRIET ORDWAY *et al.* } No. 11944. In Equity.

Know all men by these presents that we, Elizabeth Abraham, Lehman Abraham, Marks Abraham, Jacob Abraham, Isaac Abra-

ham, Samuel Abraham, Levi Abraham, and John S. Belt, are bound unto the above-named Harriet Ordway in the sum of one hundred dollars, to be paid to the said Harriet Ordway, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of August, 1891.

Whereas the above-named obligors, Elizabeth Abraham, Lehman Abraham, Marks Abraham, Jacob Abraham, Isaac Abraham, Samuel Abraham, and Levi Abraham, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named obligors shall prosecute their said appeal with effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ELIZABETH ABRAHAM, [SEAL.]
LEHMAN ABRAHAM, [SEAL.]
MARKS ABRAHAM, [SEAL.]
LEVI ABRAHAM, [SEAL.]
JACOB ABRAHAM, [SEAL.]
ISAAC ABRAHAM, [SEAL.]
By their attorney, FRANKLIN H. MACKEY. [SEAL.]
JOHN S. BELT. [SEAL.]

Sealed and delivered in presence of—
J. ARTHUR LYNHAM.

37 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed—pages 1 to 36, inclusive—to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 12th day of August, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 12th day of August, 1891.

E. F. BINGHAM,
Chief Justice. [SEAL.]

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

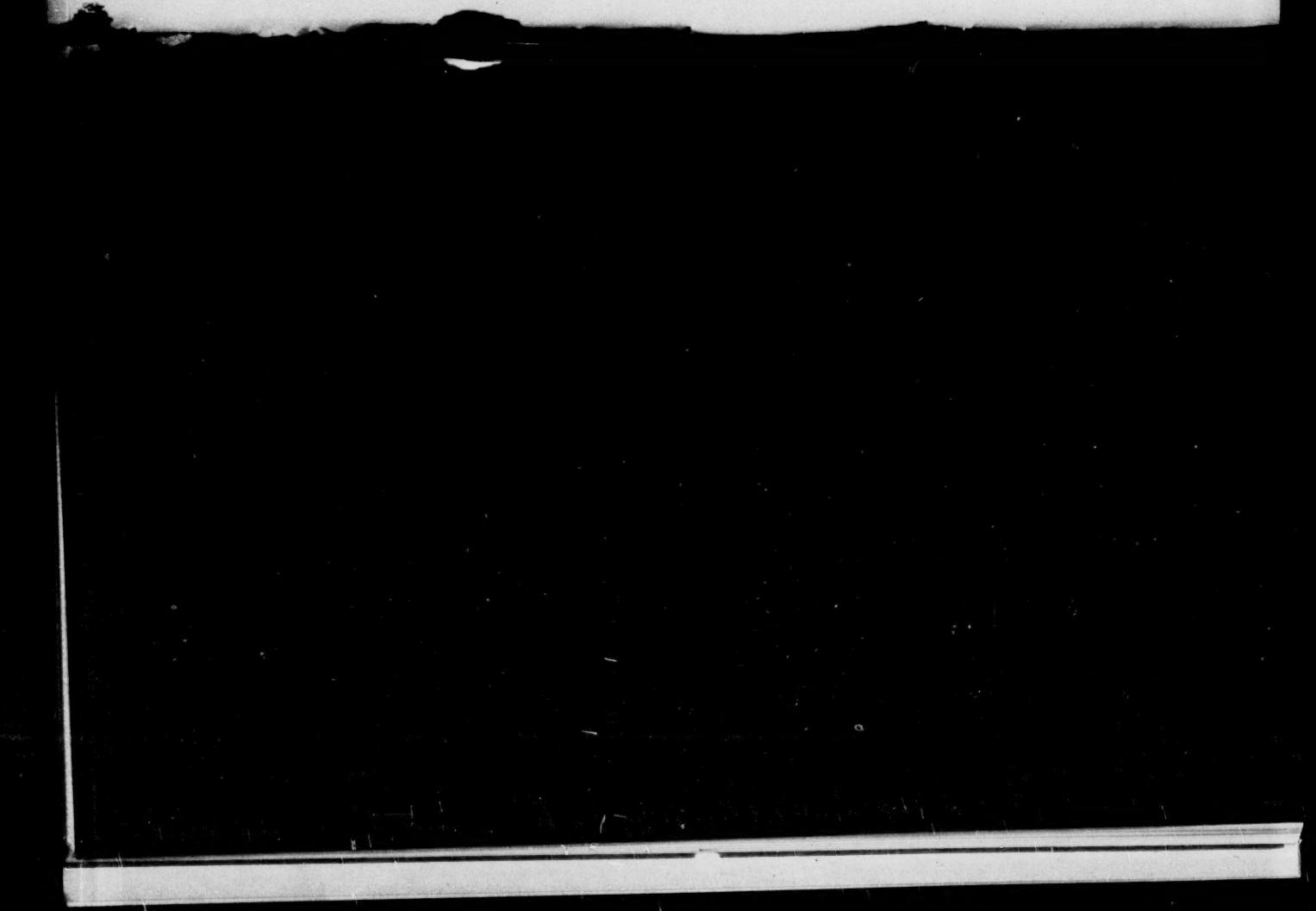
Witness my hand and the seal of said court this 12th day of August, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Case No. 14,815. District of Columbia supreme court. No. 274. Elizabeth Abraham, Lehman Abraham, Marks Abraham, *et al.*, appellants, *vs.* Frederick E. Ordway, Mary Elizabeth Ordway, and Ellen Preston, devisees of Harriet Ordway, deceased. Filed August 21, 1891.



Supreme Court of the United States.

OCTOBER TERM, 1894.

ELIZABETH ABRAHAM ET AL.

v.

FREDERICK E. ORDWAY ET AL.

Brief of Counsel for Appellants.

STATEMENT OF THE CASE.

The plaintiffs (appellants) filed their bill in the supreme court of the District of Columbia, on the 18th of January, 1890, setting forth in brief that they are the children and only heirs at law of Esther Rebecca Abraham, deceased. That on the 22d of May, 1869, Elizabeth Abraham, one of the complainants, being then the wife of Bernard Burnstine, the said Burnstine executed and delivered to one Levi Abraham, trustee, the real estate in controversy, situated in the District of Columbia, in trust for the sole use and benefit of said Elizabeth, with power to her to sell, devise, and dispose of the same as if she were a *femme sole*. That on the 10th of May, 1870, said Elizabeth was divorced from said Burnstine, and that on the 24th of June, 1870, she married one Solomon Caro. That on

the 24th of September, 1870, said Caro borrowed from the defendant Harriet Ordway $3,000, for which sum said Elizabeth signed a promissory note, payable to said Ordway in two years thereafter with interest, and that to secure said note a deed was executed by said Levi Abraham (which deed is set forth in the record, p. 8) to John E. Norris, purporting to secure said note. That on 21st of December, 1874, said Elizabeth joined in a deed with said trustee Levi Abraham in conveying said real estate to her mother, Esther Rebecca Abraham, in fee. That on the 20th of October, 1876, said Elizabeth having been abandoned by said Caro, was divorced from him and her maiden name of Elizabeth Abraham restored to her. That on the 6th day of January, 1879 (eight years after the making of said note of $3,000), said trustee Norris, for alleged default, made an alleged foreclosure sale of said real estate, at which sale Harriet Ordway, who still remained the holder of the note, purchased the property, and a deed in fee was accordingly made to her of said property. That on the 10th of August, 1886, said Esther died intestate, whereby the title to said property became vested in complainants who bring this bill of complaint. That said Harriet is now (at the time of filing the bill, January 18, 1890) in possession of said property. The trustee Norris is dead and his heirs, together with Harriet Ordway, are made defendants to the bill,

The bill alleges that the note, being given by said Elizabeth while she was a married woman, was void, and consequently the deed of trust to secure it was likewise void, and prays that said Harriet Ordway be decreed to account, &c.

A general demurrer was filed to the bill by Harriet Ordway, and on the hearing the demurrer was sustained and a decree passed dismissing the bill; which decree was

affirmed by the general term. Wherefore the plaintiffs have prosecuted this appeal.

The assignments of error are that the court erred:

1st. In holding that the deed of trust executed by Levi Abraham to John E. Norris, dated the 24th of September, 1870, was binding upon the complainants, or created a charge upon the property in controversy.

2d. In holding that the sale made of said property by said Norris on the 6th of January, 1879, and the conveyance made in pursuance thereof to Harriet Ordway were a valid sale and conveyance.

3d. In sustaining the demurrer to the bill of complaint.

4th. In dismissing the bill of complaint.

Pending this appeal, Harriet Ordway died and her heirs, the present appellees, have been made parties.

Argument.

This hearing being on demurrer, the facts must be taken as undisputed. Those to be specially noticed are:

1. The property in controversy was in the year 1869 the separate estate of Elizabeth Burnstine, a married woman.

2. In the year 1870 she became discovert by a decree of the supreme court of the District of Columbia, passed upon her petition.

3. She remained discovert for some months, and then intermarried with Solomon Caro.

4. In January, 1870, the said Caro borrowed $3,000 from Harriet Ordway, at ten per centum interest, for which the wife gave her note, and, to secure the payment of the same, Levi Abraham, trustee in the deed which vested the said separate estate in the said Elizabeth, conveyed the said separate estate to John E. Norris.

5. On the 20th day of October, 1876, the said Elizabeth obtained a divorce from the said Solomon.

6. On or about the 21st day of December, 1874, said Elizabeth conveyed the said property to Esther Rebecca Abraham in fee.

7. January 6, 1879, John E. Norris sold the said separate property under the aforesaid deed from Levi Abraham to him, and conveyed it to Harriet Ordway, the purchaser at said sale and then holder of the note.

8. Esther Rebecca Abraham died in 1886, leaving the appellants her heirs-at-law.

9. Harriet Ordway has died pending this appeal, and the appellees are her devisees.

From these undisputed facts it appears that the question for decision is: Who has the title to the said property—the appellants, claiming under the deed from Elizabeth Caro to Esther Rebecca Abraham, or the appellees, claiming under the deed from Levi Abraham, trustee, to John E. Norris?

There are several incidental questions involved in this main question, upon which the answer to the main question depends.

This is a claim "*strictissimi juris.*"

The incidental questions will be considered in detail.

First. As to the peculiar character of the estate vested in Elizabeth Burnstine by the deed to Levi Abraham.

The first question to be considered is the nature of the deed (Record, p. 5) vesting this separate estate in Elizabeth Burnstine. It was a deed to carry out an agreement for permanent separation. It was not an ordinary equitable separate estate, which is generally without valuable consideration. It was a conveyance made by a husband for the sole and separate use of the wife, for a valuable consideration, which made the deed valid against the creditors

of the grantor. Of this valuable consideration was the contract on the part of the trustee to indemnify the husband against the debts of the wife, stated in the following language: "*he, the said Bernard (the husband, grantor), is not to be liable for any debts hereafter contracted by the said wife, and if sued therefor is indemnified and saved harmless therefor by the said party of the first part, who in testimony of accepting this trust and said responsibility hath attached his hand and seal to this deed,*" &c., (Record, p. 6).

This covenant constitutes a valuable consideration.

Says Perry on Trusts, vol. 2, sec. 673, speaking of deeds of separation:

"If trustees are interposed, and they covenant, in consideration of the provisions for the wife, to indemnify the husband against her debts, or other claims on his property, it will form a valuable consideration, which will support the transaction against the husband's creditors," citing—

Stephens *v.* Olive, 2 Bro. Ch. 90; Compton *v.* Collison, *id.* 38; Worrall *v.* Jacob, 3 Mer. 256; Elworthy *v.* Bird, 2 S. & S. 381.

Deeds of this kind differ from those which create ordinary equitable separate estates, in that the wife takes under them, subject to all the common-law disabilities of coverture. (Hyde *v.* Price, 3 Ves. Jr. 437.)

In the ordinary equitable separate estate the wife, if not restrained by the terms of the instrument, can charge the estate with her general debts and may incumber or dispose of the property.

It is true that grantors in deeds like this may confer such powers, but they are not of the nature of the estate. There is another provision in this deed which it is important to consider. It is as follows:

"*Nothing in this instrument of writing shall be taken to be as qualifying or depriving either the said Bernard or the said Elizabeth of his or her legal rights under any present or future law to a divorce, * * * and from the protection and provisions of any present or future law enacted to affect the rights of husband or wife, respectively, over their own persons or property, or the disabilities now or hereafter existing by reason of coverture.*" (Rec. 6.)

This deed was made May 2, 1869. The Married Woman's Act was approved April 10, 1869. So much of it as relates to this question is as follows (we quote from the Revised Statutes of the District of Columbia):

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"SEC. 728. Any married woman may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 729. Any married woman may contract, and sue and be sued, in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried."

It will be observed that the deed we are considering does not give the wife the power to make contracts. Her power to make such contracts is regulated by the statute. The husband has no curtesy in the equitable separate estate of the wife undisposed of by her. Under the statute he has. (Uhler *v.* Adams, 1 Appeal Cases D. C. 392.)

With these general observations in reference to the estate which Elizabeth Burnstine took under this deed, and her powers and disabilities in respect to the same, we pass

to the consideration of the effect of the married woman's act upon such estate, independently of the provisions of the deed making that act a part of the deed.

And, *first*, it is maintained on behalf of the appellants that, conceding the estate which the wife held while a married woman to have been equitable separate estate, which she might have charged with the debts of her husband, yet such equitable estate became absolute upon discoverture, and as such came under the operation of the statute, and by it was made statutory separate estate.

Secondly. That, as statutory separate estate, she could not bind it or herself by any contract which was not in relation to the said estate, and, therefore, the note for $3,000 which she executed to Harriet Ordway for her husband's debt was void.

Thirdly. That the note being void, she could not by a grant by her and in her own name have charged her separate estate with the payment of the note or the debt for which the note was given.

Fourthly. That the writing by which Levi Abraham attempted to convey the said estate to John E. Norris to secure the payment of said note was absolutely void, 1st, because the deed to him gave him no power to convey, and, 2d, upon the discoverture of the married woman the legal title, by operation of the law, was divested from him and vested in Elizabeth Caro.

I.

The equitable estate (if it was such) under the deed from Bernard Burnstine and wife to Levi Abraham, trustee, was converted into absolute estate upon the discoverture of the said Elizabeth. The authorities all agree upon this point. The conflict in the authorities arises upon the

effect of a subsequent marriage. With a very few dissenting adjudications it is held that a subsequent marriage revives the equitable separate estate. Thus it is said, speaking of this class of deeds:

"The trust is founded on the powers of the court of equity to model and qualify an interest in property which it had itself created, without regard to those rules by which the law regulates the enjoyment of property in those cases. And in accordance with this view it was decided that although the prohibitory clause is nugatory whilst the discoverture lasts, yet if the property be not disposed of during that period, the prohibition will attach immediately on the second marriage."

Adams Equity (8th Am. ed.), and see Beaufort *v.* Collier, 6 Humph. (Tenn.) 287.

So, in Tullett *v.* Armstrong (1 Beav. 1), Lord Langsdale, master of the rolls, after a full review of the cases, states as a result of the authorities:

"Whether the gift to her separate use be made with or without the power of alienation, the restraint is annexed to the separate estate only, *and the separate estate has its existence only during coverture;* while the woman is discovert, the separate estate, whether modified by restraint or not, is *suspended*, and has no operation, though it is capable of arising upon the happening of a marriage."

And Lord Cottenham, in Scarborough *v.* Borman (4 Myl. & Cr. 377), reaffirmed this doctrine.

This question, however, is not material to this case further than it establishes that after the divorce from Burnstine her estate in the property was a purely legal one, and being thus a *legal* estate the statute took hold of it and excluded the marital rights of the second husband, making it unnecessary, if not impossible, to revive the equitable separate estate of the wife.

That this is so is plain from the language of the statute: "The right of any married woman to any property, personal or real, belonging to her *at the time of marriage*, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried."

At the time of Mrs. Burnstine's marriage to Caro she was the owner of this property, discharged, as we have seen, of the provisions of the trust which operated upon it while her coverture with Burnstine existed. She held it, then, prior to her marriage with Caro, just as absolutely as any unmarried woman would hold property, and on her marriage with him she continued to hold it, in the language of the act, "as *absolute* as if she were unmarried."

Again, as we have seen, the estate which this wife acquired in the property in question from her former husband, Burnstine, was peculiar. The consideration for the deed was an agreement for a permanent separation. The trusteeship in such a case was merely formal and technical. The very terms of the conveyance deprived him of all interest and control over the property. These were vested exclusively in Elizabeth Burnstine, and because of this it was expressly provided that the trustee should not be responsible for anything she did with the property. The following is the language of the deed in this particular:

"Upon trust for the sole and separate use of the said Elizabeth, *with power to her* at any time to dispose of said property in whole or in part or to encumber the same either by deed or will or other instrument in the nature of a last will and testament. And, further, the said trustee shall suffer and permit the said Elizabeth, her executors, administrators, and assigns, TO HAVE, HOLD, *use, possess, enjoy the said trust property* and to receive the rents, issues, and profits thereof *as if she was a femme sole*, and if she shall *dispose* of the said property *by sale* or

otherwise, the said trustee shall not be responsible for such sale or disposition, nor for the application of the proceeds of property."

The trustee was supposed to be necessary because the husband could not make a deed directly to the wife. The design of the deed and the fiat of the law agree in the result that the very existence of the trustee was *blotted out* when the wife became discovert by her divorce from Burnstine.

II.

The property, then, being an absolute legal estate at the time of the marriage with Caro, Mrs. Caro held it under the provisions of the married woman's act as statutory separate estate, and, being such, our next inquiry is, What were the wife's powers in respect to it? The authorities go so far as to hold that even while the coverture continues, when the legislature passes a married woman's act, such as ours, all the estate, of whatever character, held at the time of the passage of the act is embraced in its provisions. The language is very broad. "These statutes by their own operation changed her capacity to hold separate estate as a matter of equity into a legal estate, and she thereby became entitled to control and manage it as if she were a *femme sole*." (Wood *v.* Wood, 83 N. Y. 575, 580.)

These are decisions in reference to equitable separate estate existing at the time of the passage of the act. In the case at bar the act was passed *before* the deed was made, and the deed expressly declares that it was made subject to the provisions of the act—"of any present or future law"—and the statute, therefore, for two incontrovertible reasons, is the rule of the married woman's powers over her separate estate in this jurisdiction.

The powers of a married woman under the statute may be analyzed thus: (*a*) She may contract in all matters *having relation* to her separate property in the same manner as if she were unmarried. (Sec. 729.) (*b*) She may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect, as if she were unmarried. (R. S., D. C., sec. 728.)

Under this act the note which she executed for the money which her husband borrowed from Harriet Ordway was not a contract as to a matter "having relation to her separate estate," and was therefore absolutely void.

It will be observed that there are many authorities which hold that the wife's equitable separate estate will be charged with her general contracts when it was her intention so to charge it, but there is no room for the application of this doctrine of intention, in respect to her *statutory* separate estate. The statute is exclusive. The law upon this point has been forcibly expressed as follows: "It (intention) can certainly find no place in her contracts in relation to her legal estate, because as to these estates her power is granted by *express statute* or by necessary implication, and her *intention* to charge the estate cannot enlarge her power to do so. If the contract is authorized expressly or impliedly it is valid, independent of the question of intention, but if not so authorized it is difficult to see how her intention can capacitate her or infuse validity into a void contract." (Harris Contracts of Married Women, p. 42.) (See, also, Wilburn *v.* McCalley, 63 Ala., at p. 447.)

The note was void because not authorized either by the statute or by the common law.

But it is argued that conceding that to be so, yet inasmuch as the statute gives her power to convey her real estate as if sole, the deed from Levi Abraham to Norris was her deed, and she was bound by it. No authority has

ever gone so far as this. It is the common consensus that if the note attempted to be secured by the married woman's deed is void, the deed is also void. (See authorities *post.*)

It has been held, however, that if the note is valid the deed will be valid.

The *ultima thule* of this line of authorities is that if the note be the joint note of the husband and wife, although void as the note of the wife, it is valid as the note of the husband, and the deed of the wife's property to secure that note is as effectual as if the note were that of the husband alone.

This question has been frequently before the supreme court of Massachusetts, and in the case of Bartlett *v.* Bartlett (4 Allen, 442), which was the case of a joint note of husband and wife, it was decided that if it had been the note of the wife alone, the note and deed would both have been void, but as the note was valid as the note of the husband the deed to secure it was valid also.

Bartlett *v.* Bartlett, 4 Allen, 442.
Reed *v.* Coleman, 51 Miss. 838.
Pfeiffer *v.* Riehn, 13 Cal. 643.

It has been held by numerous authorities that the note of the wife executed for the debt of the husband is absolutely void. See especially the case of Hodges *v.* Price (18 Fla. 345) cited below. That case is on " all fours " with the case at bar so far as the giving of the note and mortgage to secure it is concerned.

Schmidt *v.* Postell, 63 Ill. 58.
Lee *v.* Tannenbaum, 62 Ala. 501.
Wilburn & Co. *v.* McCalley, 63 Ala. 436.
Gilbert *v.* Dupree, 63 Ala. 331.

And so is a mortgage given to secure it.

Hodges *v.* Price, 18 Fla. 342.

Sperry *v.* Dickinson, 82 Ind. 135.

Stewart Husb. and Wife, 368.

The invalid note of a married woman, being void, is incapable of ratification.

Stew. Husb. and Wife, 368.

Her invalid deed is mere waste paper.

Stew. Husb. and Wife, 368, 397, and 408.

Referring again to the authorities, which hold that equitable separate estates, existing at the time of the passage of the married woman's acts, are, by the operation of them, at once changed into legal estates, we distinguish this case from them. The act was in operation when this estate was created, and the provisions of the act are expressly a part of the deed. The deed follows the terms of the act as to the married woman's power to dispose of the property. As to her power to *contract*, the deed is silent. It was therefore left to be regulated by the statute.

THE DEED WAS NOT THE DEED OF ELIZABETH CARO.

We have been, so far, treating this case as if the deed from Levi Abraham to John E. Norris was the deed of Elizabeth Caro. But it was not. It is true she is named as the party of the second part, and she signed and acknowledged the deed. She, however, does not bargain and sell or grant anything. The test whether a deed is or is not the deed of a person named in it is what that person does on the face of and in the terms of the deed.

It has been expressly decided by this court that, "in order to convey by grant, the party possessing the right must be grantor, and use apt words to convey to the

grantee, and that merely signing, sealing, and acknowledging an instrument in which another person is grantor is not sufficient."

Agricultural Bank *v.* Rice, 4 How. 225, 241.

This Supreme Court very recently, in a case occurring in this District, reaffirmed the decision in the case of Agricultural Bank *v.* Rice, Bachelor *v.* Brerston, 113 U. S. 404.

By the express terms of the deed from Bernard Burnstine and wife to Levi Abraham, Elizabeth Burnstine *alone*, as we have seen, was clothed with power to convey the property, and if she had not been so clothed by the deed, yet immediately on her divorce from Burnstine, as the married woman's act of April, 1869, at once vested it in her as statutory estate, she was at once clothed with power to convey it.

As has been said, this is a case *strictissimi juris*.

It is argued that it is inequitable that Mrs. Ordway should lose her money; but is it any the less inequitable that Mrs. Caro should lose her property?

The indiscretion of which Mrs. Caro was guilty when she gave her note for her husband's debt was one against which the married woman's act was intended to protect her. The lender was bound to know that the law forbade Mrs. Caro to make this note. It notified Mrs. Ordway that the note was void. Was she was not guilty of something worse than laches when she induced Mrs. Caro to do that which she had no right to do?

The deed from Burnstine and wife to Levi Abraham advised Mrs. Ordway that Abraham could not by his conveyance give title to the property, and the law advised her that Mrs. Caro could not make any contract which did not have relation to her separate estate. Dealing

with a married woman, she was put upon inquiry as to her powers to contract, and contracted with her at her peril. Concede that this married woman, ignorant of her rights and powers, did, under the influence of her husband, what she supposed would render her and her estate liable for her husband's debt, does this mistake on her part deprive her of the protection of the law? Mrs. Caro could not possibly derive any advantage from the transaction. Mrs. Ordway, looking for an investment at ten per cent. interest, chose to hazard the danger of making a contract which if repudiated could not be enforced.

It is not necessary to consider the case of a deed made after the passage of the act creating a sole and separate estate with powers not conferred by the act. In such a case the question would simply be, Shall the will of the parties repeal the provisions of the act? In this case the deed, made after the passage of the act, adopts the provisions of the act as to the power of sale, in the language of the act, and adopts the provisions of the act "*as to the rights of the husband and wife respectively over their own persons or property and the disabilities now and heretofore existing by reason of coverture.*"

Laches.

The ground most relied upon in support of the demurrer was laches.

The doctrine of laches has no application to this case, for the following reasons:

1st. This is a suit in equity to recover *land*, and this court has expressly held that it will in such cases act "upon the analogy of the limitations at law; as where a legal title would in ejectment be barred by twenty years'

adverse possession, courts of equity will act upon *the like limitation* and apply it to all cases of relief sought upon equitable titles, or claims touching *real estate.*" (Wagner *v.* Baird, 7 How. 234.) Still later, in Allore *v.* Jewell (94 U. S. 506), which was a bill in equity to set aside a deed of *land* made six years and nine months before the filing of the bill, laches was set up as a defence, but the court said, "there is no *statutory bar* in the case." And in Insurance Co. *v.* Eldridge (102 U. S. 545) a bill was filed to establish privity in respect of land. Laches and delay were pleaded, but this court said it could not be set up as a defence "that the claim to have the instrument cancelled by which the privity was secured was a stale one," when it was asserted "*within the period allowed by law.*" And in a very recent case, Wherman *v.* Conklin, October term, 1894, it is said :

"If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed. If the statute limits him to twenty years, and he brings his action after the lapse of nineteen years and eleven months, he is as much entitled as matter of law to maintain it as though he had brought it the day after his cause of action accrued."

It is true that this court has held that under exceptional circumstances, as where great injustice will be done an innocent party, the court will enforce a limitation of even a less period than that provided by the statute ; but, it is submitted, the case at bar has no exceptional features such as would bring it within such a ruling. Mrs. Ordway was alive when the suit was brought. There has been no intervention of third parties who are purchasers for value. The property is in the same situation now as when our right of action accrued. There is no dealing

with an altered state of affairs, and the evidence is entirely *documentary*, so that the case comes entirely within the authorities below:

"When the delay has worked a wrong to the adverse party, who has thereby been induced to do something, or to abstain from doing something, the plaintiff is usually deemed to have precluded himself from relief, and it has been held that *so long as the relative position of the parties is not altered* to the *defendant's prejudice, delay* is of very little consequence." (Am. Cyl. 1, tit. Laches, p. 454, citing Nadd *v.* Powers, 136 Mass. 273; Daggers *v.* Van Dyke, 37 N. J. Eq. 130; Platt *v.* Platt, 58 N. Y. 646; Wollaston *v.* Tribe, L. R. 9, Eq. 44–50; *Ex parte* Adamson, L. R. 8, Ch. Div., 807–817; Ridgeway *v.* Newstend, 8 DeG. F. and J. 474–485; Lindsay Petr. Co. *v.* Hurd, L. R. 5 P. C. 221; King *v.* Anderson, 1 R. 8, Eq. 625.)

In Wollaston *v.* Tribe (L. R. 9, Eq. 44–50) a bill was brought, in 1868, to set aside a marriage settlement executed in 1858, on the ground of fraud and mistake. Lord Romilly, N. R., said:

"Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing with an altered state of matters, that might have raised a question, but there is nothing of that sort."

In *Ex parte* Adamson, James, L. J., 807, 817, said:

"Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words, or neglect, his now averring the truth, or asserting the demand, would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he has said or done."

It is especially to be noted that in the case at bar nobody has been induced by the alleged delay to do or to abstain from doing anything. The property lies just as it did when the invalid sale was made.

"Where a delay of thirteen years had occurred, but the evidence in support of the claim was *entirely documentary*, and there had been no *change* in the situation of the parties, it was held that mere lapse of time was no bar." (Cranmer *v.* McSwords, 24 W. Va. 594, 601.)

In Daggers *v.* Van Dyke (37 N. J., Eq. 130), which was a suit brought to reform a deed, the court said:

"The delay of the complainant in seeking redress constitutes no defence. It is only when the complainant has slept over his wrongs so long that great and serious wrong will be done to the defendant, that laches constitutes a complete defence. Here the parties are in almost exactly the same position that they were in at the time the wrong for which redress is sought was done, and relief may be given to the complainant without doing any harm whatever to the defendant."

The true position of the parties to this suit is such that *our* delay has been an actual benefit to the defendants. For eight years we paid them exorbitant interest on a void note. Of course they do not complain of that. Then, for eleven years after the right accrued to us to have set aside this invalid sale of which we complain, we have permitted them to receive the rents and profits of our property, when, if we had brought our suit immediately after the alleged purchase—a purchase which cost them nothing but the surrender of a void note—they would have lost all these years of illegal enjoyment of a large income. Why should they complain of that? But really they do not complain of *that*. The real objection is that we have brought our

suit *too soon*—not too late. They wish to keep on enjoying these rents and profits as long as the court will let them.

Moreover, the defendant had notice, when she purchased at this invalid sale, of all the equities of the then Mrs. Caro, and this court has held in Insurance Co. *v.* Eldridge, (102 U. S. 545) that where the defendant has notice of the plaintiff's equities at the time of the purchase he cannot set up laches as a defence.

To recapitulate, laches has no application to this case:

1st. Because this is a suit to recover *land*, and the statutory bar of an action of ejectment is applicable.

2d. Mere lapse of time is no defence when there has been no change in the status which would work a detriment to the defendant if the suit be maintained.

3d. There has been no loss of evidence or any means of defence, for the evidence is entirely *documentary*.

4th. Laches cannot avail as a defence for one who has notice of the plaintiff's equities.

On the whole case, therefore, we submit that the decree below should be reversed and the cause remanded.

H. O. CLAUGHTON,
FRANKLIN H. MACKEY,
Solicitors for Complainants.

[redacted]

[redacted]

[redacted]

ELIZABETH ABRAHAM ET AL., Appellants,

vs.

FREDERICK E. ORCUTT ET AL., Appellees.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEES.

[redacted]
Solicitor for Appellees.

[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 274.

ELIZABETH ABRAHAM ET AL., APPELLANTS,

vs.

FREDERICK E. ORDWAY ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

Statement.

The bill in this cause was filed August 3, 1889, by Elizabeth Abraham and six other persons, as the children and heirs at law of Esther Rebecca Abraham, deceased, against Harriet Ordway and the heirs at law of the late John E. Norris, trustee under a deed of trust given to secure a debt due to Mrs. Ordway, under which deed of trust the land in controversy was by him sold and conveyed to her in 1879.

The material facts, as disclosed by the bill and accompanying exhibits, are the following:

1. In May, 1869, one Bernard Burnstein, then the husband of the complainant Elizabeth Abraham, conveyed to Levi Abraham, her father, now deceased, in fee simple, part

of lot nine, in square four hundred and fifty-two, in the city of Washington, among other property, "upon trust for "the sole and separate use of the said Elizabeth, with power "to her at any time to dispose of said property in whole or "in part, or to encumber the same either by deed or will or "other instrument in the nature of a last will and testa- "ment. And, further, the said trustee shall suffer and "permit the said Elizabeth, her executors, administrators "or assigns, to have, hold, use, possess, enjoy the said trust "property, and to receive the rents, issues and profits thereof "as if she was a feme sole, and, if she shall dispose of the "said property by sale or otherwise, the said trustee shall "not be responsible for such sale or disposition, nor for the "application of the proceeds of property." The conveyance was made in anticipation of separation between the parties, who were shortly after divorced, Mrs. Burnstein intermarrying, in June, 1870, with one Solomon Caro.

2. On the 24th day of September, 1870, the said Elizabeth and Levi Abraham, her trustee, executed the deed of of trust printed at pages 8–10 of the Record, reciting that "*Elizabeth Caro* is justly indebted unto Harriet Ordway in "the sum of three thousand dollars," represented by her promissory note, of even date with the deed, and payable, with interest, two years after its date, and conveying the said part of lot nine to John E. Norris, trustee, with the customary power of sale in case of default in payment of the note.

3. Solomon Caro, her second husband, some time afterwards abandoned the said Elizabeth, and she obtained a decree of divorce from him in 1876, restoring to her her maiden name of Elizabeth Abraham; prior to which time, however, namely, in December, 1874, she had united with her trustee, Levi Abraham, in a conveyance of the property, in fee simple, to her mother, Esther Rebecca Abraham, who died in 1886, leaving the said Elizabeth and her co-complainants her only heirs at law.

4. The said Elizabeth, notwithstanding her above-recited abandonment, divorce and conveyance to her mother, continued to pay the interest upon her note to Mrs. Ordway for some eight years after its execution, when, ceasing to do so longer, and the principal as well as the interest being past due and unpaid, the trustee, Norris, in January, 1879, sold and conveyed the property, under the terms of the deed of trust and for less than the face of the encumbrance, to Mrs. Ordway, who thereafter received the rents and profits.

5. The bill, filed August 3, 1889, sets up for the first time that the indebtedness secured by the deed of trust of September 24, 1870, though recited therein to be the debt of Elizabeth Caro, and represented by her promissory note, was the debt of her then husband, Solomon Caro, for money borrowed by him from Mrs. Ordway on the day the deed bears date, and upon its security; that her promissory note, because of her then coverture, was void, and that the deed of trust to secure the same was, accordingly, without legal effect, and that the sale and conveyance by Mr. Norris to Mrs. Ordway consequently created a resulting trust in favor of complainants, under which they pray that Mrs. Ordway may be decreed to convey the property to them, and to account to them for the rents and profits received by her since the date of the sale.

The defendant Ordway demurred to the bill; the demurrer was sustained by both the special and the General Term, and the case is here upon appeal from the decree of the latter dismissing the bill.

The other defendants to the bill were not served with process—did not appear or answer, nor are they made parties to this appeal.

Pending the appeal, Mrs. Ordway has died, and the present appellees, her devisees, have been substituted in her stead.

Points and Authorities.

The propositions relied upon in support of the case of the appellants appear to be five in number, namely:

I. That, upon the divorce between Bernard and Elizabeth Burnstein, her separate estate in the property became a legal, as distinguished from an equitable, separate estate, and under the Married Woman's Act in force in the District of Columbia, retained the latter character notwithstanding her subsequent marriage with Solomon Caro.

II. That, as such statutory separate estate, the property in question could not be bound by a deed of trust given to secure the wife's promissory note, which, though purporting to be her debt, was in reality the debt of her husband.

III. That the deed from the wife and her trustee to John E. Norris conveyed no title to him, because the deed to them gave the said trustee no power to convey.

IV. That the deed from the wife and her trustee to John E. Norris conveyed no title for the further reason that, upon her divorce from Bernard Burnstein, the legal title vested in the wife, who did not join in the granting portion of the deed to Norris.

V. That the court below erred in holding that there was such laches on the part of the complainants and those under whom they claim as to preclude relief in equity.

Upon these propositions two general observations are to be made, namely:

In the first place the first and second of the propositions in question are dependent, the one upon the other, neither constituting alone any ground for relief. Unless it be true that the interest of the said Elizabeth, upon her divorce from her first husband, became and ever after continued to be a legal estate, and unless it also be true that, under the laws in force in the District of Columbia, a deed of trust

given by a married woman to secure money loaned upon her promissory note is void as against her legal separate estate if the money was borrowed by or for the husband's use, the bill fails. Neither proposition, separately, can defeat the deed.

In the second place, it is to be observed that if any of the grounds of relief contended for are well taken, the appellants have stated themselves out of court. The bill affirmatively shows that Mrs. Ordway was, and for ten years prior to institution of the suit had been, in actual possession of the property.

If the deed to Norris was indeed void, as contended, either upon the ground that the estate of the said Elizabeth was a legal separate estate and under the married women's act in force in the District of Columbia incapable of being conveyed to secure her note given for her husband's debt, or upon the ground that the deed to Levi Abraham gave him no power to convey, or for the reason that the legal title was in Elizabeth Caro and she did not convey, then the present suit is a bill in equity by the holder of the legal title to recover land from a disseizor in possession.

The absolutely fatal character of the second of these objections is apparent, without argument. That the common law action of ejectment does not afford a plain, adequate and complete remedy to all persons in the category in which the bill places the appellants, will hardly be claimed, and certainly cannot be maintained. And equity jurisdiction, in the Federal courts, extends to no case in which there is an adequate remedy at law, even though fraud or mistake be involved.

Buzard *vs.* Houston, 119 U. S., pp. 351–3.
Kramer *vs.* Kohn, 119 U. S., p. 357.
Grandchute *vs.* Winegar, 15 Wall., pp. 375–7.

So far as this suit is concerned, therefore, the cause might

well be rested here. It is important to all the parties, however, and to the public as well, that it be decided upon its merits, and the litigation finally terminated; and we therefore proceed to consider the several grounds for maintaining their bill relied upon by the appellants.

I.

The first of these propositions is that, upon the divorce between Bernard and Elizabeth Burnstein, the estate of the latter in the property in question became a legal, as distinguished from an equitable, separate estate, and that, by reason of the provisions of the Act of April, 1869, relating to married women, it ever after retained the latter character notwithstanding her subsequent marriage with Solomon Caro.

This is an attempt to return, under a forced and wholly unnecessary construction of the Married Woman's Act, to an innovation upon the doctrine of the equitable separate estates of married women at one time adopted by the English courts, limiting the duration of such estates to an existing or first marriage, and excluding revival of the trusts upon a second coverture.

Woodmeston *vs.* Walker, 2 Russ. & Myl., 197.
Massey *vs.* Parker, 2 Myl. & Cr., 174.
Newton *vs.* Reid, 4 Sim., 141.

The foundation of this doctrine was opposition to restrictions upon alienation through the provisions against anticipation which such settlements permitted, against which opposition, as Lord Cottenham declares in Tullett *vs.* Armstrong, 4 Myl. & Cr., at p. 396, "the necessity of affording to parents the means of securing property for their daughters in the advent of their subsequent marriage was urged in vain."

Chancellor Kent, in his Commentaries, refers to the view

sought to be established by these authorities as "a new doctrine, . . recently started in England;" while the repudiation of it by the subsequent cases is designated as "a recurrence to the older and juster doctrine."

2 Kent Com., 165, note *b*; 170, note 1.

See, also, as to the earlier decisions upon the subject, Roberts *vs.* West, 15 Ga., 123, and citations.

In Tullett *vs.* Armstrong, 4 Myl. & Cr., 390, Lord Cottenham, who had delivered the opinion in Massey *vs.* Parker, *supra*, overrules the entire doctrine in question, holding that the equitable separate estate, together with prohibition against anticipation "which constitutes its value," does, and on grounds both of public policy and of justice ought to, revive upon a second marriage. This decision has ever since been affirmed and adhered to by all the authorities, both English and American, except in the State of Pennsylvania.

Bagett *vs.* Meux, 1 Phillips, 627.
Gaffee's Trust, 2 MacN. & G., 541.
Tullett *vs.* Armstrong, 1 Beav., 1.
Waters *vs.* Tazewell, 9 Md., 291.
Nix *vs.* Bradley, 6 Rich. Eq., 55, and citations.
Bridger *vs.* Wilkins, 3 Jones Eq., 342.
Beaufort *vs.* Collins, 6 Humph., 487.
2 Jarm. on Wills, 559–60, and note.
2 Stor. Eq. Jur., Sec. 1384.
Perry on Trusts, Sec. 653.
Pomeroy's Eq. Jur., Sec. 1109.

Such being the established doctrine of equity upon this subject, the question presented by the first proposition on behalf of the appellants in this case is, whether the Act of April 10, 1869, commonly known as the Married Woman's Act, does not abolish equitable separate estates altogether in

this District. This contention, it is true, is in terms limited to the proposition that, after termination of the existing or first coverture, the wife's interest becomes and thereafter continues to be, throughout any number of subsequent covertures, a legal separate estate; but, upon any consideration of the subject, it will be apparent that if the terms of the statute are sufficient to displace the well established doctrines of courts of equity relating to equitable separate estates in their application to a second marriage, they must operate equally upon a future first coverture, and so abolish absolutely all equitable separate estates in the District of Columbia, except such, possibly, as were already in existence at the date of the act.

Such a consequence, carrying with it denial of the right of parents and others to provide for the future of daughters as against improvident marital influence, heretofore enjoyed, of course will not be deduced from the statute by construction, merely, unless the legislative intent to that effect is reasonably clear. The object of the act being simply to emancipate the property rights of married women from the common law rights of the husband therein, the well established rules of construction would seem to interpret and restrict it as referring only to property interests of the wife to which the husband's common law rights attached, and, therefore, not to apply at all to equitable separate estates. 1 Bl. Com., 61.

The entire act will be found in the Revised Statutes of the District of Columbia, at page 87, and is as follows:

"Sec. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"Sec. 728. Any married woman may convey, devise and

bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"SEC. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her in the same manner as if she were unmarried."

The question is, does this statute, either in terms or by necessary or reasonable construction, abolish equitable separate estates, or interfere in any manner with the power to make future settlements of property in that long established and well understood form, with all its legal incidents and advantages?

It has not, thus far, been contended on behalf of the appellants that there is anything in the language of that statute which expresses such an intent, or which by reasonable construction necessitates such a result. Some reference, it is true, is made to the clause providing that the wife's right to property belonging to her at the time of her marriage "shall be as absolute as if she were unmarried;" but as her right to her property settled to her equitable separate use is *more* absolute than if it were legal separate estate, at least under the construction contended for by the appellants, no unfavorable consequence is deducible from that phraseology. The appellants, conceding that, if the trust revived upon her second coverture, her power to charge the land with her note was as absolute as if she were unmarried, contend that her second marriage deprived her of that right, so that it was no longer as absolute as if she were unmarried, thus conceding that the doctrine of the revival of the trusts upon her second marriage, so far from conflicting with the clause of the

statute in question, comports with it more strictly and more fully than the construction for which they contend.

Some authorities are cited by appellants to sustain the proposition that deeds which are executed in view of separation between husband and wife, to provide for the maintenance of the latter and to indemnify the former against debts created by her, are distinguishable from ordinary settlements to separate use—in what respects distinguishable, or with what pertinence to the present controversy, does not clearly appear. The citations are irrelevant, the principal one, that of Hyde *vs.* Price, 3 Ves. Jr., 437, being simply to the effect that, under such a settlement, containing no express power to dispose of the property, the wife cannot do so, and thus expose her husband and trustee to the risk of liability for her future maintenance. In the present case that power is given, in terms.

The proposition that the equitable separate estate is converted into and continues to be, notwithstanding a second coverture, a statutory, legal separate estate rests, then, not upon either the language or the spirit of the act, but upon the claim that similar statutes have been so construed in some of the States.

The authorities thus relied upon are two in number, viz., Wood *vs.* Wood, 83 N. Y., 580, and Wilburn *vs.* McCalley, 63 Ala., 436.

The first of these cases differs from the case at bar in two important particulars. In the first place, the property had been conveyed directly to the wife, without naming any trustee, so that the legal title was in her, and her husband was simply constructively trustee. In the second place, and particularly, the New York statute affirmatively and unmistakably manifested the legislative purpose to convert existing equitable separate estates into statutory legal estates, and provided, in terms, for proceedings in the courts under which the trustees under the former should be compelled to surrender and convey the legal title directly to the married

woman. The suit was brought by the wife against a tenant in possession, who defended on the ground that, the court proceeding authorized by the act not having been resorted to, the legal title was in the husband; *held*, that, under the statute in question, which expressly intended conversion of the equitable into a legal separate estate, resort to the courts was not necessary where the legal title was already in the wife, the statute alone being sufficient, under the circumstances, to displace the merely constructive trusteeship of the husband.

It will be observed that the entire feature of the New York statute upon which the controversy in the case cited was determined, is wholly absent from the statutes in force in the District of Columbia. Even with it, the court concedes, impliedly at least, that if the legal title were in a trustee, as here, the statutory court proceeding to convert the equitable into a legal estate would have been necessary, and the authority of the case is, therefore, notwithstanding the difference in the statutes, against rather than in favor of the position of the appeliants here.

Wilburn *vs.* McCalley, 63 Ala., 463, the second of the two cases cited, is still more unfortunate for the appellants, holding clearly that the Married Woman's Acts do not abolish or in any manner affect that which, before their passage, was known as the wife's equitable separate estate. The question was as to the liability of a deceased wife's estate, under the Alabama statute, for debts contracted "for articles of comfort and support" of the family. The court held that the property, having been acquired by devise in terms excluding the marital rights of the husband, was an equitable separate estate; that the method of charging the two estates, notwithstanding the Married Woman's Act, continued to be essentially different; that, if the estate were statutory, the wife could not have charged it by such contracts as those sued upon, but that, being equitable, she could charge it by her own acts and agreements, and to the

same extent unless restrained by the terms of the instrument creating the estate, as one *sui juris* could do.

The precise question here presented has been the subject of repeated adjudications in Alabama, fluctuating materially in some respects, but always maintaining that equitable separate estates, with all their characteristics and incidents, remain unaffected by the modern statutes relating to the property rights of married women where, as in the case at bar, the legal title is vested, not in the wife, but in trustees.

In Pickens *vs.* Oliver, 29 Ala., 518; Smith *vs.* Smith, 30 Ala., 642; Cannon *vs.* Turner, 32 Ala., 483, and Cowles *vs.* Morgan, 34 Ala., 539, it was held that the acts in question relate to estates created "without words which would have created a separate estate before our statutes on the subject; and not to estates which, independent of legislation, would have been separate by operation of the instrument or contract creating them."

In Glenn *vs.* Glenn, 47 Ala., 204, followed by Denechaud *vs.* Berry, 48 Ala., 591, this doctrine was declared applicable to conveyances to trustees, as in the present case, to the separate use of married women, but inapplicable to a conveyance direct to the wife, though expressed to be for her sole and separate use; it being held that conveyances in the latter form created statutory, legal separate estates, incapable of being charged by the wife, by way of mortgage or otherwise, with the debts of the husband. But in Short *vs.* Battle, 52 Ala., 456, followed and approved by Wilburn *vs.* McCalley, 63 Ala., 436, the latter cases are in turn overruled, and the doctrine of the earlier cases finally and conclusively re-established. See also Lippincott *vs.* Mitchell, 94 U. S., 767.

In Short *vs.* Battle, the court declare: "In the absence of the statute, if the husband did not renounce his marital rights, the property of the wife became the property of the husband. He had unqualified dominion over her personal property; and, of her real estate, but a mere reversion was

left in the wife or her heirs. Having title, it was subject to the payment of his debts, and he could alienate or devise it at pleasure. To take away these common law rights of the husband and to define and regulate the manner in which the property should be held to which these rights would have attached, was the only purpose of the statutes. Property, of the wife to which these rights could not attach; which was, by the instrument conferring title, freed from them, and from all liability to the husband's debts, and from his power of disposition, was not within the purview of the statutes. Such property was not subject to the mischief the legislature proposed to remedy. It was secured to the wife without the aid of the statutes. It was left to be governed by the law which for ages protected it, while the statutes find a field of operation in securing to the wife other property needing legislative protection. . . . The donor of the estate, if he offends no law, may impose whatever limitations or impart whatever qualities or incidents he chooses to the estate he may create."

In all the cases, as is recognized by this court in Lippincott *vs.* Mitchell, 94 U. S., at p. 769, conflicting as they are in other respects, it is agreed that equitable separate estates in which the legal estate is vested in a trustee, are not brought within or affected by the statute. And the weight of the argument and of reason, it is submitted, is overwhelmingly with the earlier and [redacted] established view that the statute is without relation to or effect upon equitable separate estates, whether created with or without the intervention of trustees.

Fully

So, in Mitchell *vs.* Otey, 23 Miss., 236, it is declared that the Married Woman's Act of that State does not oust the original jurisdiction of courts of equity in cases affecting the separate estate of married women.

It is respectfully submitted that the appellants' first proposition, viz, that the Married Woman's Act converted the estate of the complainant, Elizabeth, into a statutory, legal

separate estate, and thus disabled her upon her second marriage from validly making any contracts which, as the owner of an equitable separate estate, she could have made, is unsupported by either principle or authority, and is untenable.

II.

The appellants' second proposition is that, if the wife's interest was a statutory, legal separate estate as claimed, a deed of trust to secure her promissory note given for the accommodation of her husband, or to borrow money for him, is void.

This claim includes two propositions, namely: First, that the promissory note is void because not given in a matter having relation to her separate estate; and, secondly, that the deed of trust is void, because given to secure a void note.

1. It is true that the Supreme Court of the District of Columbia has construed the statute in question so strictly as to deny to the wife power to make any contract, the consideration of which does not directly enure to or concern the property, as distinguished from herself. She has been treated as, virtually, a mere agent of or for the property, the scope of her agency being limited so as to include power to make only such contracts as are for the benefit or on account of the property.

For example, where the husband was without resources, and the wife, being possessed of a legal separate estate, said to a grocer, "Supply my family with necessaries, and I will pay you out of my separate estate," it was held, in Schneider *vs.* Garland, 1 Mackey, 350, that the contract was void, on the ground that the purchase of necessary food for either the wife or her family, though purchased expressly on the credit of the separate estate, was not a contract in relation to it. This construction has never been satisfactory to the

Bar of the District, and it is a source of gratification that the opportunity is now, for the first time, afforded for presenting it to this court.

The language of the act is: "Any married woman may "contract, and sue and be sued in her own name, in all "matters *having relation* to her sole and separate property, "in the same manner as if she were unmarried."

Relation, according to Worcester, is "a connection be- "tween things as a subject of the understanding." Its synonyms are, *reference, respect, regard.* Soule's English Synonyms.

Etymologically considered, it is from the Latin "*refero*," *to bring back*, and would mean the bringing back, or reference, of one thing to another by the perception or establishment of some connection between them.

And the question is, therefore, whether or not a contract made by a married woman with the intention to bind her separate estate, or, by both parties, upon its credit, is not a contract which relates to such separate estate.

The weight of authority is that contracts for the benefit of the separate estate, or for the wife's benefit upon its credit, or made with intent to bind the separate estate and upon its credit, as, for example, for money borrowed ostensibly to pay interest upon an encumbrance upon the property, whether applied to that purpose or not, or for the board of a wife and her husband upon her promise to pay out of her separate estate, is valid.

McVey *vs.* Cantrell, 70 N. Y., 295.
Maxon *vs.* Scott, 55 N. Y., 247.
Yale *vs.* Dederer, 18 N. Y., 265.
Hammond *vs.* Corbett, 51 N. H., 311.
Williams *vs.* Huguinnon, 69 Ill., 214.
Corn Exchange Ins. Co. *vs.* Babcock, 42 N. Y., 613.
Williams *vs.* King, 43 Ct., 569.
Miller *vs.* Brown, 47 Mo., 504.
Boston *vs.* Cummings, 16 Ga., 102; and—
Grenough *vs.* Wigginton, 2 Green., 435.

Hammond *vs.* Corbett, 51 N. H., 311, was a suit upon the wife's promise to pay for fuel out of her "State aid"—a provision made by the legislature for the wives of soldiers during the late war. *Held*, first, that the State aid was her separate property, and, secondly, that her promise to pay from that source made it a contract in respect to her separate estate. "The law which was intended to benefit the "married woman by enabling her to hold the property to "her sole and separate use, so that it might not be taken "from her upon her improvident husband's debts, really "did her a great wrong if it did not enable her to contract "upon her own credit for the absolute necessaries of life, "and to create a personal liability based upon her own pri- "vate individual funds, *when both parties designed and in- "tended to contract in that way.*"

This is the condition to which the contention of the appellants is intended to reduce married women in the District of Columbia, even as to property settled to their equitable separate use, and, therefore, presumptively intended by the grantor to give her the larger powers pertaining to that species of estate.

See Lord Thurlow in Hulme *vs.* Tenant, 1 B. C. C., 20.
Bullpin *vs.* Clark, 17 Ves., 365.
Tullett *vs.* Armstrong, 4 Beav., 323.
Owens *vs.* Dickenson, Cr. and Ph., 53.
Wright *vs.* Schard, 4 Drew, 673, and—
2 Story's Equity Jurisprudence, Sec. 1400.

"The statute was not designed to abridge the power of married women, or to give them less authority over their separate real estate, which might be held by them free from the control or interference of their husbands, than they had at common law over lands held by them in their own right."

Bartlett *vs.* Bartlett, 4 Allen., 440, 443.

The wife may charge her legal separate estate, created by statute, to the same extent and for the same purposes that she could have charged her equitable separate estate created by an instrument of trust.

Kelly's Contracts of Married Women, p. 265, and citations.

Ballin *vs.* Dillaye, 37 N. Y., 35.

2. But, in the second place, even if it be true that the promissory note of a married woman having a statutory or legal separate estate is void, in the sense that she is not personally liable upon it, unless the consideration enured to the benefit of or grew out of her separate property, is it true that her deed of trust upon her separate estate given to secure a debt of her husband, although that debt is represented by her promissory note, is void and ineffectual to charge her property?

That a married woman may validly mortgage her separate estate to secure the debt of her husband was determined by this court in Stephens *vs.* Bell, 22 Wall., pp. 337–8, and by many authorities throughout the States. The securities resting upon the validity of such encumbrances, and the value of the real estate in this District the title to which depends upon that rule, aggregate immense sums of money. It is contended, however, that, in all such cases, it is essential to the validity of the transaction that the husband join with the wife in the note, in default of which the note, being that of the wife alone, will be void, and the mortgage will fall with it.

As a question of authority, this proposition rests solely upon a purely obiter dictum in Bartlett *vs.* Bartlett, 4 Allen, 442, and the case of Brick *vs.* Scott, 47 Ind., 299. Hodges *vs.* Brice, 18 Fla., 342, 345, sometimes referred to as supporting the proposition, is simply a construction of certain somewhat obscure and confused provisions of the Florida

Code, in no way analogous to our statute; while Sperry *vs.* Dickenson, 82 Ind., 132, merely holds that the wife's mortgage of her legal separate estate is valid, if the *mortgage* contains a promise by her to pay the debt.

The expression relied upon in Bartlett *vs.* Bartlett, 4 Allen, 440, 443, is a mere dictum, and an inconclusive one at that.

In Brick *vs.* Scott, the court, recognizing that a wife may mortgage her legal separate estate for her husband's debt, holds that, where she gives her individual note for that debt, and a mortgage, although conveying her property to secure that note, does not in terms covenant to pay it, the note is void, and the mortgage, accessory to it, falls with it.

It is respectfully submitted that such reasoning is too artificial, and too utterly at variance with the settled rules of construction, to justify its approval or adoption. That two instruments, executed on the same day, between the same parties, and together constituting one transaction, are not to be construed together as one instrument, would be a novel doctrine. But, if they are construed together, the wife's promise to pay is as much a part of the transaction as if it were contained in the mortgage. And the court maintains, and is followed by the case of Sperry *vs.* Dickenson, supra, that if the promise itself appear in the mortgage, the latter is valid.

In Brick *vs.* Scott, it was perfectly apparent that the debt was the debt of the husband, while, in the case at bar, this is alleged on the face of the bill. It was equally unmistakable, in Brick *vs.* Scott, that the object of all the parties, including the wife, was to secure the husband's debt by a mortgage upon her property. It was conceded by the court that it was competent to do this, and it would have been competent to do it without any promissory note, or any promise to pay upon the part of the wife, whatsoever; but, because this unmistakable common object was accompanied

by the wife's promise in the form of a promissory note to pay the debt, the whole transaction was declared invalid. It is respectfully submitted that the weight of the argument was with the dissenting judge in that case.

The fact that the principal debt is non-enforcible by reason of the incapacity of the debtor, does not release a security for the payment of such debt. Dillon, J., in Jones *vs.* Crossthwaite, 17 Iowa, 399.

It is respectfully submitted, therefore, upon the second proposition of the appellants, that such precedents as exist for the rule contended for rest upon insufficient reasoning, are in conflict with the immemorial rules of construction regarding instruments executed at the same time, between the same parties, and constituting one instrument, abandon substance to considerations of mere form, and are at variance with the language of the statute.

III.

The third proposition of the appellants is that the deed form Elizabeth Caro and Levi Abraham, her trustee, to John E. Norris, conveyed no title to him, because the deed to the said Abraham gave him no power to convey.

The deed from Burnstein to Abraham, referred to, will be found at pp. 5-8 of the Record. It unquestionably conveys the legal title to Levi Abraham, the trustee, and not to the wife. It directs that she, who did not have the legal title, should have power " to dispose of said property in whole or " in part, or to encumber the same either by deed or other " instrument in the nature of a last will and testament," and provides that if she shall dispose of it by sale or otherwise, " the said trustee shall not be responsible for such sale or " disposition, nor for the application of the proceeds of the " property."

The legal title being vested by the deed in the trustee, it

is obvious that it was he alone who could execute any conveyance of it, and that the grantors must have contemplated and intended this. The same conclusion is apparent from the provision that the trustee should not be responsible for any sale or disposition of the property which the beneficiary might direct, nor for the application of the proceeds of the property. He could by no possibility have been responsible for either, if no power of disposition was intended to be given him by the deed. It is submitted that, upon a fair construction of the Burnstein deed, the provision that the trustee should permit the beneficiary to encumber the property, the title being in the trustee, read in connection with the further provision that the trustee should not be responsible for such sale or disposition, nor for the application of the proceeds of the sale, means that the trustee should make such conveyance as the beneficiary might direct. The parties themselves gave that construction to the instrument in the deed to Norris, and there certainly seems to be a total absence of any meritorious ground upon which to overturn the latter instrument.

IV.

The fourth proposition is that, the legal title having vested in the wife and continued in her notwithstanding her second coverture, as contended in the appellants' first proposition, the deed from herself and Levi Abraham to Norris was ineffectual to vest the latter with the legal title, because the granting words in that deed are those of Abraham, not joined in by her. This proposition is supposed to be supported by the decision of this court in Bachelor *vs.* Brereton, 113 U. S., 404.

This case of Bachelor *vs.* Brereton is wholly inapplicable. The wife in that case was not named in the deed, the deed did not purport to convey her interest in any property, her

trustee did not join in it, her signature to the deed was with entire propriety considered to have been added with reference to her dower interest in her husband's property, which the deed conveyed, rather than to her separate interest therein. This was simply an application of the rule previously laid down by the Supreme Court in the case of Dundas *vs.* Hitchcock, 12 How., p. 256. Agricultural Bank *vs.* Rice, 4 How., p. 241, is scarcely more applicable to the facts and circumstances of this case.

It is entirely apparent upon the record that Mrs. Ordway's money was obtained upon the credit intended to be given by the deed from Levi Abraham and Elizabeth Caro to Mr. Norris, and that this was the intention of all the parties. It is equally obvious that, in the contemplation of all of them at that time, the legal title to the land was in Abraham, and that the Burnstein deed authorized conveyance of it by him by way of encumbrance, at her request or direction, and that she joined in the deed for that purpose. If this mutual or common understanding as to the form of the deed should afterwards have proved erroneous, equity would have intervened to correct the error in form. The present application, made nineteen years afterwards, is for the aid of the court of equity in taking advantage of such supposed common error, for the purpose of defrauding the lender of the sum borrowed.

V.

Finally, it is respectfully submitted that the court below was amply justified in holding that the bill discloses such laches on the part of the complainants and those under whom they claim, neither explained nor attempted to be explained, as precludes standing in equity.

The deed to Norris was made in 1870, nineteen years before the bill was filed. It confesses, upon its face, that the complainant Elizabeth paid interest upon the note for eight years or more, at the expiration of which period the liability

JAMES H. [illegible]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

ELIZABETH ABRAHAM *et al.*,
Appellants,

vs.

FREDERICK E. ORDWAY *et al.*,
Appellees.

No. 274.

Brief of Appellants in Reply to Brief for Appellees.

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Franklin H. Mackey,
Solicitors for Appellants.

Gill & Wallace, Law Printers, Washington, D. C.

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BRIEF OF APPELLANTS IN REPLY TO BRIEF FOR APPELLEES.

The learned counsel for the appellees argues, "that if any of the grounds of relief contended for be well taken the appellants have stated themselves out of court." The error of this contention is the result of the failure to distinguish the different views taken of equitable separate estate by courts of equity and of law, respectively. It is not denied, in respect of such estates, that the legal title must be in a trustee—in other words, that the wife's estate must be equitable. It was at one time held that because of this essential of the separate estate, if the conveyance was directly to the wife it could not be separate property, and to escape this result courts of equity arbitrarily held that in such cases the husband was trustee. But the wife owns the estate as a *feme sole*, and therefore may dispose of it as a *feme sole*. Her deed of her separate real estate vests the title in her grantee. The

authorities agree that unless restrained by the instrument creating the title she may dispose of it as a *feme sole*, and her disposition of it will be sanctioned by a court of equity without the assent of her trustee, unless that assent be made necessary by the instrument creating the trust. (Leading Cases in Equity, vol. 1, part 2, pp. 686, 687, 715, 739.)

If it were conceded that the deed from Bernstein to Abraham created an equitable separate estate, yet by that deed the legal title was vested in Levi Abraham, who had no power to dispose of it at all, while the sole power of disposition was vested in Elizabeth Bernstein, and the appellants claim under a deed from the said Elizabeth, yet they have no standing in a court of law. The legal title was in Levi Abraham. He violated his trust in conveying the legal title to John E. Norris; but that legal title would prevail in a court of law. Take the case of a separate estate conveyed directly to the wife, in which case, we have seen, equity arbitrarily creates a trustee. Could such trustee maintain an action of ejectment? The grantor in the deed put the legal title in Levi Abraham to be held for a certain purpose; and in violation of that trust he conveyed it to another. While the act was void as to the *cestui que trust*, she, having only an equitable title, could not recover upon it in a court of law.

Thus far we have been treating of the power to convey. The question as to whether the property was legal or equitable separate estate is of little importance as it bears upon the right and power to convey. The power to contract is the vital question in this aspect of the case. If it was equitable separate estate, was she competent to charge it with her contracts not having relation to, or for the benefit of, that estate? There is no shade of opinion possible upon the question of the power of the wife to charge her separate estate which the courts have

not expressed. The law of this jurisdiction as to the power of a married woman to bind her equitable separate estate by her contracts, is that she may bind it by a contract which declares that it was her purpose to charge it, and not otherwise.

Stewart *v.* Smith (3 Mackey, 281).

This was a case of equitable separate estate in which a married woman borrowed money with an agreement that it should be a charge upon her equitable separate estate, and the court, speaking of the contract, says:

"Our decision does not turn upon the nature of the property, but upon the ground that the defendant is not shown by this bill to have made any such contract which, *in the contemplation of our statute*, relates in any sense to her separate property."

This decision is an interpretation of the meaning of the words "having relation" in the married woman's act of this District.

It is deemed unnecessary to reply at any length to the argument for the appellees as to the question of the effect of the married woman's act upon her equitable separate estate existing at the time of the enactment, to the discussion of which the greater part of the brief is directed. There is no reason why the language of the act, "any property, personal or real, belonging to her at the time of her marriage shall be as absolute as if she were unmarried," etc., shall not be as applicable to equitable separate estate as to any other property. It will not be denied that Congress has the power to abolish equitable separate estate altogether. Some decisions were referred to which place this construction upon similar statutes, but it was distinctly stated in that brief that it was not necessary to rely upon these decisions, because (1) the equitable separate estate in this case was created after the passage of the act, and (2) by the express terms of

the deed it was made subject to that act or any act that might be passed respecting the disabilities of coverture, etc.

Under these circumstances, conceding this deed to have created a technical equitable separate estate, it in terms adopts the provisions of the married woman's act, which limits the contracts which she may make to those having relation to her sole and separate property. Surely, in the case of an equitable separate estate the donor may restrain the married woman's power to contract by adopting the statute law upon that subject, and by so doing preclude the implication of larger powers, and leave no room for the doctrine of intention. The learned counsel does not attempt to reply to the argument based upon the ground that a separate estate created by a deed carrying out an agreement for a permanent separation is not a technical separate estate, but is one which the wife holds subject to all the common law disabilities of coverture, although authorities were cited directly to that point.

In the discussion of the second position, to wit, that a married woman in this jurisdiction can not make any other contract than one having relation to her separate estate, the learned counsel admits that the decisions of the Supreme Court of the District of Columbia have construed the act most strictly, but argues that the weight of authority is against such construction, and cites a number of authorities in support of his contention. It will be found that the statutes under which these cases were decided are much broader than ours. In New York a married woman may be a sole trader, and make contracts for labor and services on her sole and separate account, and the earnings, profits, and proceeds are hers. In New Hampshire she may contract as if she were unmarried. In Illinois she may make general contracts as a *feme sole*, except to form a copartnership. In Georgia

she may be a public or free trader, in which event she is liable as a *feme sole* for all her contracts. In the case of Ballin *v.* Dillaye, cited by the counsel for the appellees, the court held that an equitable separate estate of the wife was bound only for contracts which she might make on the credit of such estate and for the benefit of such estate, and that under the statute of New York (which we have seen is much broader than ours) her legal separate estate was liable only for contracts of the same character.

We do not feel called upon to deny that a married woman could mortgage her equitable separate estate to secure a debt of her husband. The answer to all that has been said on the other side is simply this: This deed was given, not to secure the debt of anyone, but to secure the payment of a promissory note given by a married woman. The only part—the fact that the note was given for a debt of her husband—plays in this argument is that it being so given, the contract was not in relation to her separate estate, and was therefore void. That the note was given for money loaned to the husband is admitted by the demurrer. It is only the assertion of an axiomatic truth that no mortgage or deed of trust given to secure a void obligation, can be valid. Of course, if the mortgagor or grantor is capable of making a promise to pay, and there is in the deed or mortgage an independent promise to pay, the security will be valid. It is true, as alleged by the counsel for the appellees, that the language of the court in Bartlett *v.* Bartlett is "obiter," but this was in explanation of what was charged as being a departure from the former decisions of that court. They had uniformly held that the note of the wife alone being void, her deed to secure it was also void, and the "obiter" distinguished those cases from Bartlett *v.* Bartlett. It was as though the court had said: It is true we have

always held that a deed to secure a note of the wife alone would be void, and so we would decide in this case if the note was of the wife alone, but being the note of the husband and wife it is valid as the note of the husband, and the deed to secure the note is therefore also valid. The test as to whether the deed to secure the note was valid is whether or not she could have been sued at law upon it, for the liability to be sued is only the result of the power to contract. Suppose the deed recited that the debt was the debt of the husband, and then in terms promised to pay the debt, could she have been sued upon that promise? If not, how could the deed to secure the fulfillment of that promise be valid. Would not the deed upon its face show that the contract was not a contract having relation to her separate estate? In a qualified sense a deed encumbering her separate estate is a contract relating to her separate estate, but is it a contract within the meaning of that portion of the act which specifies her power to contract?

The statute provides two distinct classes of powers; one is the power to contract, the other the power to dispose. Can it be presumed, with this distinction of powers clearly defined, that Congress meant to say that a deed disposing of the property is a contract relating to her separate estate? This would be tautology. And yet this deed can be sustained, if at all, only upon the ground that it is a contract having relation to her separate estate within the meaning of that language, which gives her the power to *contract* as distinguished from the power to *dispose*.

The deed authorized Mrs. Bernstein to convey and dispose of the property, but gives no authority to the trustee to do so. Holding the legal title at law, he might convey it under such circumstances as to pass a title valid at law, at the same time void in equity, relief against which can only be had in equity. If, for any

reason, Mrs Burnstein was not in equity bound by that conveyance, she has the right to have it declared null and void, and the only way by which she could be bound was by joining in the deed and granting her separate estate. It will hardly be contended that the deed of the trustee alone would have conveyed the equitable separate estate of the wife. All that was in the trustee was the legal title, and that was all that his deed could vest in his grantee. The property belonged to Mrs. Caro, and no one but Mrs. Caro could convey it, and in order for her act to be a conveyance of it she must have used words which the law requires in order to constitute a grant. As we have seen, she could have conveyed her property without the trustee, but the trustee could not convey it because it did not belong to him.

The only remaining proposition relied upon by the appellees is that, inasmuch as all the parties well understood that the note itself was to be a charge on the separate estate, and the deed was given as a lien to secure the charge, that the intent of the parties should be carried out by the court decreeing the deed to be a charge by way of correcting the mistake in the law. But "if an agreement was not founded upon a mistake of a material fact, and if it was executed in strict conformity with itself, it would be unprecedented for a court of equity to decree another security to be given different from that which had been agreed upon, or treat the case as if such other security had in fact been agreed upon and executed." (Hunt *v.* Roussamier's Administrators, 1 Pet., 1.)

Courts of equity may compel parties to execute their agreement, but they have no power to make agreements or alter those which have been understandingly made. (U. S. *v.* Ames, 99 U. S., 46.) The note was the contract, intended to be a charge upon the separate estate. The deed was executed by the parties to secure the note.

The note not being a charge upon the separate estate, the court can not decree that the deed executed for another purpose shall be such charge.

If either the note of Mrs. Caro or the deed of Levi Abraham could be held to be a *charge* upon the separate estate of the *feme covert,* this would not make valid the sale and conveyance made by John E. Norris. When such charge exists, it can only be enforced by proceedings in equity for that purpose. If, therefore, the court should hold that the giving of the note constituted a charge it would not be inconsistent so to hold and yet decree the sale to be void and sustain the note as a charge upon the property.

Laches.

The contention of defendant's counsel that their remedy against Solomon Caro has been lost by plaintiff 's alleged delay to institute proceedings loses all force on an analysis of the facts.

In the first place, the deed to Norris was not the deed of Elizabeth Caro. It was the deed of Levi Abrahams. She was not bound by its recital that she was indebted to Mrs. Ordway. By taking a deed of that sort Mrs. Ordway was chargeable with knowledge that she was taking a deed which she could not enforce, for Elizabeth Caro, a married woman, could not *contract* a debt by borrowing money, when the contract had no relation to her separate estate. If it be true, therefore, that the money was loaned to Mrs. Caro, then the whole transaction was void, *ab initio,* and it is well settled that the doctrine of laches has no application to *void* transactions. If, however, the money was loaned, as we say it was, to Solomon Caro, how can Mrs. Ordway charge us with laches in not informing her of that fact, when none could know the fact better than she who loaned the

money? In other words, here is a person who loans money and takes a deed to secure it; that deed recites that the money was loaned to a married woman, who had no power to contract a loan of this sort. If the recital is true, the deed is void. If the recital be untrue, she knew it to be untrue, and that her claim was against Solomon Caro and not against Mrs. Caro, and yet knowing this fact, she charges us with laches in not informing her.

Next it should be remembered that for six years after the making of this deed Mrs. Caro was under coverture, during which time the remedy against Solomon Caro became barred by Mrs. Ordway's failure to enforce the claim which she had against him for money loaned him. Are we to be charged with *her* neglect? When Mrs. Caro became discovert, Mrs. Ordway's rights against Caro were barred by her neglect to institute proceedings against him within the period fixed by law; therefore, even if Mrs. Caro had immediately after discoverture notified Mrs. Ordway that she would not pay a divorced husband's barred debt, it would have done no good, for the recourse against him was already lost. Hence it is absurd to say that by *our* delay she has lost her recourse against him. To reduce the proposition to a nutshell, we say:

1st. If the money was loaned to Mrs. Caro, as Mrs. Ordway said it was, then the transaction was utterly void and laches do not apply.

2d. If the money was loaned to Mrs. Caro, as Mrs. Ordway says it was, then she never had any right of action against Solomon Caro, and consequently has lost none by our alleged delay.

3d. If the money was loaned to Caro, as *we* say it was, then, of course, the lender knew the fact and knew what her rights were against him. If she failed to exercise

those rights, she has nobody to blame but herself. Certainly the wife of the debtor can not be be chargeable with laches during the six years she was under coverture, and during which time Mrs. Ordway suffered the debt to become barred.

The learned counsel next attempts to combat our proposition that in cases where the thing claimed is *land*, equity will not (except under most exceptional circumstances, and the case at bar has no exceptional features) in its application of the doctrine of laches adopt a shorter period than that applied by courts of law under the statute of limitations in this District twenty years. He cites in answer to the numerous cases cited by us, *five* cases, excluding Jenkins *v.* Pye and Marshall *v.* Richards; in none of the others was *land* the thing claimed. Let us examine them:

McKnight *v.* Taylor, 1 How., 161, was not a suit to recover real estate, but a suit brought to procure the satisfaction of a debt out of real estate. This debt, which was the foundation of the plaintiff's case, and the only thing which could give him a standing in court, was claimed by the defense to have been long since paid and satisfied. The court in its opinion intimated that the strong probability was that the debt was paid as claimed by the defense, but said in any event it would not in matters of *account* after the lapse of nearly twenty years investigate the facts.

So likewise was Godden *v.* Kimmel, 99 U. S., 201, the case of a creditor seeking to satisfy a disputed debt out of real estate.

In Jenkins *v.* Pye, 12 Peters, 241, which was a bill filed to set aside a deed of lands, the case was clearly decided upon its *merits*, although Mr. Justice Catron in his opinion states that "*more* than twenty years elapsed from the execution of the conveyance to the time of the filing of the bill."

Brown *v.* County of Buena Vista, 95 U. S., 157, was a bill to enjoin the enforcement of a judgment. Land had nothing whatever to do with the case. The Iowa five years' statute of limitations, the court said, "perhaps" might not apply, but even if it did not the doctrine of laches was in *analogy* to the statute held applicable, for the delay was eight or nine years, at least that is as near as we can get at it in the report of the case, the judgment having been taken it 1865, while the decision was rendered in November, 1877, more than twelve years afterwards.

Harwood *v.* R. R., 17 Wall., 78. In that case the bill was filed to vacate a judicial decree five years after its rendition. The first and entirely sufficient ground for dismissing the bill was *want of proper parties.* Nevertheless, after holding the bill unmaintainable upon that ground, the court did, it is true, briefly refer to this delay in filing the bill, and said it was fairly to be inferred that the plaintiff knew of the judicial proceedings as they progressed, and made no attempt to interfere with them. Nor was $2,000,000 worth of property sold for $25,000, as erroneously stated by defendant's counsel. The statement in the opinion is that "the road was subject to nearly $2,000,000 prior incumbrances and sold for the *further* sum of $25,000; that is to say, it sold for $2,025,000, probably all it was worth. The case bears no analogy whatever to the case at bar, which is a suit to recover *land*, not a railroad.

In Mackall *v.* Richards, 124 U. S., 183, the defendant had "expended large sums" upon the faith of his purchase made in perfect good faith. The delay—twelve years—was greater than in the case at bar, and there is no contention that the defendants have expended anything upon the faith of the purchase.

We submit, therefore, that the learned counsel so far from refuting our proposition has sustained it. This

court has never held that *mere delay* itself, short of twenty years in analogy to the statute, will bar a suit in equity to recover land. There must be exceptional circumstances to justify the application of a shorter period.

But the defendants claim that they are "liable to account for rents, profits, expenses, and disbursements throughout this long period of time (10 years), without any knowledge or means of knowledge at the time that such an accounting would or could be demanded, and of the consequent occasion for keeping accounts, preserving vouchers, and the like." The answer is that all this, if true, may be a good defense to *accounting* before the auditor for a period prior to three years before the institution of the suit, in analogy to the staute of limitations as to personal actions, which in this District is three years. But no such embarrassment affects the *title* to the land itself; *that* it must be conceded is altogether *documentary.*

Lastly, it is said that:

"The entire case of appellants rests upon the allegation first made nineteen years after the transaction in question that the debt secured, which in the deed is recited to be the debt of Elizabeth, was the debt of Solomon Caro—an allegation not supported by any documentary evidence, and upon which the parol testimony of Levi Abraham, Mr. Norris, and of Mrs. Ordway, all of which would have been available if the claim had been asserted within any reasonable period, has been lost," etc.

This is a remarkable position to take, to say the most of it.

The learned counsel means by this, if he means anything, that if these persons were living he would be able to show that it was not in fact Solomon Caro who was loaned the money, but Elizabeth, his wife. Well, if he were able to show that he would show that his clients have no *title* to the property, for, as we have seen, if it

was Mrs. Caro who got the money the contract was void; not voidable, but absolutely void. In what worse position, then, is he if we show that the debt is Caro's and not the wife's? From a legal standpoint the plaintiffs have placed the defendants in a better position by stating the *truth* of the transaction than if they had stood by the false recital of a deed drawn by Mrs. Ordway's attorney, for deeds of trust to secure money loaned are presumably, and almost invariably, drawn by the lender's attorney. Had the plaintiffs stood by that recital they could have brought their action of ejectment where equitable defenses would have been shut out, and recovered under the instructions of the court, but having preferred to state the exact truth they give the defendants the advantage of any equitable defense they may have, and we are told they are to be punished for doing so.

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